(26)

No. 97-1121-CSY Title: City of Chicago, Petitioner
v.
Jesus Morales, et al.

Docketed: January 8, 1998 Court: Supreme Court of Illinois

Entry	Date	Proceedings and Orders
	Jan 5 1998	Petition for writ of certiorari filed. (Response due March 9, 1998)
	Jan 26 1998	Order extending time to file response to petition until March 9, 1998.
	Feb 10 1998	This extension is granted for all respondents.
	Mar 9 1998	Brief amicus curiae of Chicago Neighborhood Organizations filed.
	Mar 9 1998	Brief amici curiae of Ohio, et al. filed.
	Mar 9 1998	Brief amici curiae of United States Conference of Mayors, et al. filed.
	Mar 9 1998	Brief of respondents Youkhana and Cota in opposition filed.
	Mar 16 1998	Brief of respondents Jesus Morales, et al. in opposition filed.
	Mar 16 1998	Motion of respondents Jesus Morales, et al. for leave to proceed in forma pauperis without affidavits of indigency filed.
	Mar 19 1998	Reply brief of petitioner City of Chicago filed.
	Mar 25 1998	DISTRIBUTED. April 17, 1998
	Apr 20 1998	Motion of respondents Jesus Morales, et al. for leave to proceed in forma pauperis without affidavits of indigency GRANTED.
	Apr 20 1998	Petition GRANTED. SET FOR ARGUMENT December 9, 1998. **********
	May 7 1998	Motion of petitioner to dispense with printing the joint appendix filed.
	May 18 1998	Motion of petitioner to dispense with printing the joint appendix GRANTED.
	May 20 1998	Order extending time to file brief of petitioner on the merits until June 19, 1998.
	Jun 17 1998	Brief amicus curiae of Los Angeles County filed.
	Jun 19 1998	Brief amici curiae of U.S. Conference of Mayors, et al. filed.
	Jun 19 1998	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Jun 19 1998	Brief amicus curiae of Center for Community Interest filed.
	Jun 19 1998	Brief amicus curiae of United States filed.
	Jun 19 1998	Brief amicus curiae of Chicago Neighborhood Organization filed.
	Jun 19 1998	Brief amici curiae of National District Attorneys Association, et al. filed.
	Jun 19 1998	Brief amici curiae of Ohio, et al. filed.
	Jun 19 1998	Brief of petitioner City of Chicago filed.
	Jun 19 1998	LODGING consisting of ten copies of a bound report entitled Gang and Narcotic Related Violent Crime, 1993 - 1997, submitted by counsel for the petitioner.

2 pp

No. 97-1121-CSY

Entry	Date	Proceedings and Orders
	Jun 24 1998	Order extending time to file brief of respondent on the merits until August 14, 1998.
	Jul 9 1998	Motion of Ohio, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
	Jul 9 1998	Opposition of petitioner to motion of Ohio, et al. for leave to participate in oral argument filed.
	Jul 23 1998	Order further extending time to file brief of respondent on the merits until September 11, 1998.
	Aug 20 1998	Application (A98-155) for leave to file respondents' brief on the merits in excess of the page limitation, submitted to Justice Stevens.
	Aug 24 1998	Application (A98-155) granted by Justice Stevens, allowing a maximum of 75 pages.
	Aug 27 1998	Motion of Ohio, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
	Sep 11 1998	Brief amicus curiae of See Forever/The Maya Angelou Public Charter School filed.
	Sep 11 1998	Brief of respondents Jose Morales, et al. filed.
	Sep 11 1998	Brief amici curiae of National Black Police Association, et al. filed.
	Sep 11 1998	Brief amici curiae of National Law Center on Homelessness & Poverty, et al. filed.
	Sep 11 1998	Brief amicus curiae of Illinois Attorneys for Criminal Justice filed.
	Sep 11 1998	Brief amici curiae of Chicago Alliance for Neighborhood Safety, et al. filed.
	Sep 11 1998	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Sep 23 1998	Application (A98-250) for leave to file petitioner's reply brief on the merits in excess of the page limitation, submitted to Justice Stevens.
	Sep 25 1998	Application (A98-250) granted by Justice Stevens, allowing a maximum of 35 pages.
	Oct 14 1998	Reply brief of petitioner City of Chicago filed.
	Oct 26 1998	Record filed.
	Nov 2 1998	CIRCULATED.
	Nov 2 1998	Record filed.
	Dec 9 1998	ARGUED.

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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CITY OF CHICAGO,
Petitioner,

v.

JESUS MORALES, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Illinois

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a loitering ordinance authorizing the arrest of persons who have disobeyed a police order to move on, given when a police officer has reasonable cause to believe that a group of loiterers contains a member of a criminal street gang, is impermissibly vague in violation of due process guarantees.

2. Whether, despite legislative findings about the deleterious effects of loitering by criminal street gangs, an ordinance that requires a group of loiterers containing criminal street gang members to obey a police order to move on violates substantive due process guarantees.

PARTIES TO THE PROCEEDING

The petitioner is the City of Chicago. The respondents are persons arrested under Chicago's gang loitering ordinance: James Youkhana, Fernando O. Cota, Jose A. Merced, Roosevelt McMullan, Jr., Johnny R. Newsome, Anthony D. Cordero, Julio M. Barroso, Hermie J. Khamo, Lamont J. Jordan, Lisa Gonzales, Florentine Soto, Renee Goodwill, Tasha White, Sabrina Brown, Gregorio Guiterrez, Sandy Garvin, Raul Jimenez, Jr., Daniel Washington, Jose Renteria, Jesus Morales, Malcolm Ramsey, Neil Round, Christopher Lostroscio, Casey A. Mazeika, Karl T. Kelly, Jesse K. Paschke, Roy Delgado, Jr., Japheth Estrada, Jorge Lopez, Wladyslaw W. Jedrol, James J. Portway, Michael A. Horton, Paris Bryant, Wesley Saffold, Eric Jones, Roshindaj Bryant, Leroy Minley, Jr., Eric Warren, Charlie Monden, Joseph Dell, Tywan Durnell Riley, Eric Miller, Jerry Cunningham, Eric Dennis, Vernon Diggs, Deandre Fitzpatrick, Darryl Hall, Cornelius Holt, Jonathan Lewis, Seth Lewis, Steve Reynolds, Claude Ross, Dushone Scott, Michael Simmons, Chester Sparks, Clarence Taylor, Michael Taylor, Stacey Wilson, Gabriel Ruiz, Maximilano Orozco, Ricardo Florez, Anibal Hernandez, Pablo Estrada, Juan Cruz, Andres Feliciano, and Peter Quinones.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. ———

CITY OF CHICAGO,

Petitioner,

v.

JESUS MORALES, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Illinois

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the City of Chicago, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Illinois in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (App., *infra*, at 1a-19a) is not yet reported, but will be reported at 177 Ill. 2d 440, 687 N.E.2d 53 (1997). The opinion of the Illinois Appellate Court in *City of Chicago v. James Youkhana* (App., *infra* at 20a-36a) is reported at 277 Ill. App. 3d 101, 660 N.E.2d 34 (1995). The opinions of the appellate court in *City of Chicago v. Jesus Morales* (App., *infra* at 37a-38a) and *City of Chicago v. Malcolm Ramsey* (App., *infra* at 39a-40a) are unreported. The opinion of the Circuit Court of Cook County in *City of Chicago v. James Youkhana* (App., *infra* at 41a-59a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on October 17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.[1]

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1. The Chicago gang loitering ordinance is set out in the appendix to this petition. App., *infra* at 60a-63a.

STATEMENT

On June 17, 1992, the Chicago City Council adopted an ordinance authorizing police officers to order any group of individuais loitering in a public place to disperse if the officer reasonably believes that the group contains a member of a criminal street gang. App., *infra* at 61a. Failure to comply with the order is punishable by up to 6 months imprisonment, a $500 fine, or up to 120 hours of community service. App., *infra* at 63a.

[1] The opinion of the Illinois Supreme Court invalidated the Chicago gang loitering ordinance under the Due Process Clauses of both the federal and state Constitutions. The text of these provisions is virtually identical (compare U.S. Const. amend. XIV, § 1 with Ill. Const. art. I, § 2), and the court relied on federal and state precedents interchangeably. Its opinion contains no plain statement that the judgment rests on an adequate and independent state ground. Accordingly, this Court has jurisdiction to review the judgment below. See, *e.g.*, *Pennsylvania v. Labron*, 116 S. Ct. 2485, 2487 (1996) (per curiam); *Arizona v. Evans*, 514 U.S. 1, 7-10 (1995); *New York v. Class*, 475 U.S. 106, 109-10 (1986); *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983). In fact, in their brief below, respondents asked the Illinois Supreme Court to make an express statement that a judgment invalidating the ordinance rested on an independent state ground, even calling the holding of *Michigan v. Long* to the court's attention, but the court did not do so.

Enactment of the ordinance followed hearings before the Chicago City Council's Committee on Police and Fire exploring the problems that criminal street gangs present for the people of Chicago—in particular the problems created by public loitering by gang members.[2] At the hearings, witnesses described how criminal street gang members loiter as part of a strategy to recruit new members, organize as a group, claim territory, and antagonize rival gangs and ordinary citizens. Supp. R. I at 121, 125; Supp. R. II at 32. Further testimony explained the inadequacy of existing laws to address this problem. Residents may complain to police of illegal gang activity taking place on their own streets, but once the police arrive, gang members and their cohorts will not commit any overt criminal act; instead, they will appear to be simply loitering. Supp. R. I at 50-51, 68, 79-80, 138-40; Supp. R. II at 33, 38. The testimony also showed that community residents are often afraid to file formal complaints, serve as witnesses, or take other steps necessary to prosecute criminal activity because of concerns for their own safety, or the safety of their family members or property. Supp. R. I at 50, 52, 54, 69, 108-09, 135; Supp. R. II at 22-25, 37, 40.

Perhaps most important, the testimony before the City Council disclosed that criminal street gangs are menacing and destructive regardless of whether their members are, at a particular moment, violating other laws. The intimidating presence of gangs itself has a palpable detrimental effect on a family's sense of well being, on the willingness of parents to allow their children outside, and on the willingness of Chicago residents to remain in the City. Supp. R. I at 53, 62, 93, 95, 110, 132, 138; Supp. R. II at 167.

[2] The transcripts of the hearings were lodged with the trial court in each case that was ultimately before the Illinois Supreme Court, and were then added as a supplemental record on appeal by stipulation. We cite to that supplemental record as "Supp. R."

Based on this testimony, the City Council, in the preamble to the ordinance, made the following findings:

> WHEREAS, In many neighborhoods throughout the City the burgeoning presence of street gang members in public has intimidated many law abiding citizens; and
>
> WHEREAS, one of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas; and
>
> WHEREAS, members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know police are present, while maintaining control over identifiable areas by continued loitering; and
>
> WHEREAS, the City Council has determined that loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity . . . .

App., *infra* at 60a-61a. The ordinance provides simply:

> Whenever a police officer observes a person he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

App., *infra* at 61a. "Loiter" is defined as "to remain in any one place with no apparent purpose." *Ibid.*[3]

During the hearings, representatives of the Departments of Law and Police informed the City Council that the Chicago Police Department would promulgate regulations for the ordinance that would guide its enforcement by

[3] The ordinance also contains a comprehensive and precise definition of "criminal street gang." App., *infra* at 61a-62a.

the police. See Supp. R. II at 185, 220. Police Department General Order 92-4 was later promulgated to govern when police officers are permitted to enforce the gang loitering ordinance. The Order permits the enforcement of the ordinance only in areas of the City designated by a district commander as areas where "the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community." App., *infra* at 68a. The Order also provides specific criteria and objective standards for defining criminal street gangs, and that such gangs will be identified only on the basis of "specific, documented and reliable information" such as crime pattern information, surveillance results, witness interviews, admissions of street gang members, or information from informants of proven reliability. App., *infra* at 66a-67a. The Order also explains how membership in a criminal street gang may be established. The Order requires probable cause to believe that an individual is a member of a criminal street gang (App., *infra* at 71a-72a), and probable cause, in turn, requires "specific, documented, reliable information" that is substantiated by the arresting officer's experience and knowledge of the alleged offenders, such as an individual's admission of membership, an individual's display of distinctive colors, tattoos, or markings not ordinarily worn by persons other than criminal street gang members, the use of distinctive signs or symbols, or statements by a witness of proven reliability or whose statements can be independently corroborated. App., *infra* at 67a-68a.

After the ordinance became effective, numerous prosecutions of individuals for violating its proscriptions ensued, and various trial judges issued conflicting rulings on the constitutionality of the ordinance. In *City of Chicago v. Youkhana*, which became the first case to reach the Illinois Appellate Court, the defendants moved to dismiss the criminal cases against them on the ground that the ordinance was unconstitutional on its face. The circuit court

granted that motion in a written opinion. App., *infra* at 41a-59a.

The City took a timely appeal, and on December 18, 1995, the appellate court affirmed. The court made four separate holdings of facial unconstitutionality on federal grounds: the ordinance infringes constitutionally protected rights of speech and assembly because it "reaches conduct that the government has no business prohibiting," App., *infra* at 26a; it is unconstitutionally vague because it "fail[s] to establish . . . guidelines" for its enforcement, App., *infra* at 33a; it "unconstitutionally criminalizes a person's status" because it is directed at loitering by gang members; App., *infra* at 33a; and it "jeopardizes the rights guaranteed under the fourth amendment" because it "seems to us to be a transparent attempt to avoid the probable cause requirement," App., *infra* at 35a. Following that decision, on December 29, 1995, the appellate court consolidated all appeals the City had taken in other cases in which a trial court had declared the ordinance to be unconstitutional, and affirmed on the strength of *Youkhana*. See *City of Chicago v. Ramsey* (App., *infra* at 39a-40a). Also on that date, the appellate court consolidated all appeals taken by defendants from judgments of conviction under the ordinance in which constitutional attacks on the ordinance had been rejected, and reversed the judgments on the strength of the decision in *Youkhana*. See *City of Chicago v. Morales* (App., *infra* at 37a-38a).

The City filed petitions for leave to appeal to the Illinois Supreme Court from the appellate court's judgments in the three appeals. In addition, the City moved the appellate court to issue a certificate of importance in *Youkhana*.[4] On February 27, 1996, the appellate court

[4] The Illinois Supreme Court has mandatory jurisdiction in cases in which the appellate court has issued a certificate of importance. See Ill. Const. art. IV, § 4(c); Ill. Sup. Ct. R. 316. Its exercise of jurisdiction in cases on petition for leave to appeal is discretionary. See Ill. Sup. Ct. R. 315.

issued the certificate of importance. On April 3, 1996, the Illinois Supreme Court granted the petitions for leave to appeal in *Morales* and *Ramsey*, and consolidated them with the *Youkhana* appeal.

On October 17, 1997, the Illinois Supreme Court affirmed the judgments of the appellate court on two grounds. First, the court concluded that the gang loitering ordinance was impermissibly vague. The ordinance fails to give persons fair notice of what conduct is prohibited because it " 'makes criminal activities which by modern standards are normally innocent' " (App., *infra* at 9a (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972))), and employs language—the term "loiter"—that "is inadequate to inform a citizen of its criminal implications" (App., *infra* at 9a). As for the ordinance's requirement that a police officer reasonably believe that a group of loiterers includes a member of a criminal street gang, the court concluded that this "depends solely on the police officer's subjective evaluation of the facts of the situation in light of his own experience." App., *infra* at 12a. The prerequisite that loiterers also disobey an order to move on before they can be arrested failed to save the ordinance because "[m]erely adding the element of refusing to obey an order by police to disperse does not elevate the gang loitering ordinance to such a level that it provides adequate notice of proscribed conduct." App., *infra* at 13a. The court also concluded that the ordinance permitted arbitrary and discriminatory enforcement by conferring "unfettered discretion in the police to determine whether a suspect's conduct has violated the ordinance." App., *infra* at 15a.

Second, the court concluded that the gang loitering ordinance offends substantive due process. Again relying on *Papachristou*, the court reasoned that the freedom to loiter, while not expressly protected by the Constitution, constitutes a fundamental right as one of the "amenities of American life." App., *infra* at 17a. The court also

determined that a prohibition on loitering infringes the "right to travel," the "right of locomotion," the "right to freedom of movement," and "the general right to associate with others." App., *infra* at 18a. This deprivation of constitutionally protected liberty was "utterly unreasonable," since it deprived "[p]ersons suspected of being in criminal street gangs . . . of the personal liberty of being able to freely walk the streets and associate with friends, regardless of whether they are actually gang members or have committed any crime." *Ibid.*

REASONS FOR GRANTING THE PETITION

Criminal street gangs, as the Illinois Supreme Court recognized, "are an expanding cancer in our society and their illegal activities endanger the safety of many law-abiding citizens." App., *infra* at 17a. Among the problems posed by gangs are those engendered when gangs can loiter with impunity on the public ways. The findings of the Chicago City Council, which the Illinois Supreme Court did not question, explain that loitering by criminal street gang members and their hangers-on poses at least two kinds of problems. First, although gang members blatantly engage in drug deals and other crimes on the public way in full view of neighborhood residents, they stand about pretending to be innocently loitering once the police arrive. Second, the mere presence of a large collection of brazen, lawless, and violent gang members and others on the public way intimidates residents, who become afraid even to leave their homes. Thus the gang loitering ordinance is designed to provide residents and communities with a greater measure of control over those who disrupt community stability, detract from property values, and intimidate their neighbors.[5]

[5] The gang loitering ordinance has generated considerable academic commentary. See Comment, *Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 Calif. L. Rev. 379 (1995); Comment, *Curbing Gang-Related Violence in America: Do Gang Members Have a Constitutional Right to Loiter on Our Streets?*, 43 Case W. Res. L. Rev. 661 (1993); Note, *The Troubled Constitutionality of Antigang Loitering Laws*, 69 Chi.-Kent L. Rev. 461 (1993).

Chicago's experience with the gang loitering ordinance reflects its import. In the period of time during which the ordinance was enforced before the appellate court's decisions in this case, we estimate that some 45,000 orders to disperse were issued under the ordinance and obeyed, and some 43,000 arrests were made of those who failed to move on after being ordered to do so. Removing a visibly lawless element whose very presence on the public ways was often viewed by rival gangs as an invitation to violence had a substantial effect on the level of gang-related violence in Chicago. In 1995, for example, the last year in which the ordinance was enforced, the level of gang-related homicide in Chicago dropped at a considerably steeper rate than the general homicide rate, while in 1996, without enforcement of the ordinance, the overall homicide rate continued to fall, but the level of gang-related homicide resumed its rise.[6] Perhaps it is just this simple: if fewer gang members are standing around in public where they constitute an inviting target for their rivals, fewer of them—and innocent people nearby—will be shot to death.

Loitering ordinances are therefore an important prophylactic alternative to the largely reactive approach of conventional criminal laws, which require the authorities to wait for a breach of the peace to occur, often with tragic consequences. Prosecutions for these other crimes also depend on proof from victims or witnesses willing to cooperate and able to remain alive until the time of trial. Because of just these problems, prophylactic measures, such as loitering laws, have been employed at all levels

[6] Homicide statistics maintained by the Chicago Police Department show that in 1995, the overall homicide rate in Chicago fell 9%, but the gang-related homicide rate fell 26%. In 1996, the overall homicide rate fell another 4%, but the gang-related homicide rate rose 11%.

throughout our Nation's history. But under the approacn taken in the decision below, it is decidedly unlikely that any loitering ordinance could survive constitutional attack. The Illinois Supreme Court has held that the concept of loitering is itself fatally vague, and cannot be cured even if an arresting officer must satisfy an objective test for identifying which groups of loiterers are subject to the ordinance—here a reasonable belief that the group loitering includes a member of a criminal street gang. Moreover, the court concluded that this ordinance provides insufficient notice to persons of what conduct is forbidden, even though the ordinance requires that loiterers receive actual notice in the form of an order to disperse before they are subject to arrest. And the court's conception of substantive due process as protecting anyone standing or walking on the public ways as long as such a person is not committing any other crime means that the basic prophylactic goal of loitering ordinances is constitutionally forbidden.

This approach is inconsistent with decisions in other jurisdictions, which have upheld loitering ordinances as long as police officers are required to employ an objective test in order to enforce them. Still other jurisdictions admittedly have reached results consistent with the holding below, in large part in reliance on broad language in this Court's decision in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). Review of the decision below is warranted to resolve the differing approaches that various jurisdictions have taken to the constitutionality of loitering ordinances, and to confine the ambit of *Papachristou* so that it does not unduly constrain legitimate exercises of state and local police powers.

1. The decision below reflects a serious misapplication of vagueness doctrine. That "doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

Kolender v. Lawson, 461 U.S. 352, 357 (1983). Thus vagueness doctrine has two prongs, focusing "on actual notice to citizens and arbitrary enforcement . . . ." *Id.* at 358. There is no constitutional infirmity on either prong here.

The gang loitering ordinance easily satisfies the first prong. No one who has been given a police order to move on could fail to understand what is required of him, and under our ordinance, no arrest can be made unless there is first a police order to move on and a refusal to comply with that order. On this point, this Court's holding in *Colten v. Kentucky*, 407 U.S. 104 (1972), is dispositive. Colten had attempted to engage a police officer in conversation while the officer was issuing a traffic ticket, and then disobeyed the officer's order to move on. See *id.* at 106-07. The Court upheld the Kentucky disorderly conduct statute against a vagueness attack, noting that anyone "should understand that he could be convicted . . . if he fails to obey an order to move on." *Id.* at 110. Accordingly, the statute was "sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." *Ibid.*

To be sure, the Illinois Supreme Court was correct that if police officers are afforded standardless discretion to order individuals to move on, the refusal to obey a police order does not cure vagueness. App., *infra* at 12a-14a. As the court below recognized, in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), this Court explained, albeit in dicta, that an ordinance granting the police discretion to order anyone standing on a street or sidewalk to move on would be impermissibly vague. The Court's reasoning there, however, was not premised on a lack of fair notice, but rather on the risk of arbitrary and discriminatory enforcement. See *id.* at 90-91 & n.5. When it comes to providing notice to potential offenders, an ordinance requiring disobedience of a police order before an arrest can be made is the antithesis of vague: people

are told precisely what they must do—move along—to avoid arrest.

On the second prong of vagueness doctrine—whether the ordinance permits arbitrary or discriminatory enforcement—the ordinance also passes muster. This aspect of vagueness jurisprudence requires that "laws must provide explicit standards for those who apply them." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). Thus, enactments that are enforced based on the wholly subjective judgments of police officers are condemned. For example, in *Kolender*, the statute required a loiterer to provide "credible and reliable" identification to a police officer, and thereby conferred "virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute . . . ." *Id.* at 358. See also *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (ordinance prohibiting "annoying" conduct is impermissibly vague because "no standard of conduct is specified at all"). Chicago's gang loitering ordinance, however, specifies objective standards for enforcement judgments.

First, whatever imprecision there may be in the term "loiter," that term plainly does not permit officers to issue any type of order to anyone who is moving along. Second, and more important, the ordinance contains an expressly objective test for the propriety of directing loiterers to move, permitting officers to order groups to disperse only if the officer "reasonably believes" that the group contains a member of a criminal street gang. App., *infra* at 61a.[7]

[7] General Order 92-4 construes the ordinance to require probable cause to believe that a member of a criminal street gang is loitering, and there are rigorous standards for determining membership in a criminal street gang. App., *infra* at 67a-68a, 71a-72a. Such administrative guidelines for enforcement are appropriately considered in evaluating claims of vagueness. See, *e.g.*, *Kolender v. Lawson*, 461 U.S. at 355; *Hoffman Estates*, 455 U.S. at 494 n.5. The Illinois Supreme Court questioned the efficacy of General Order 92-4, observing that respondent Morales was arrested because the officer determined he was a gang member because he was wearing black and blue clothing. App., *infra*, at 16a n.1. The court misunderstood the record on this point. Morales was not arrested merely because of the colors he was wearing, but also because the loiterers admitted they belonged to a criminal street gang. C. 3. The trial judge later convicted Morales, finding that he had admitted that he was a member of a criminal street gang, although he had himself denied belonging to the gang. Tr. 9/20/93 at 19, 22.

And, of course, all criminal statutes are enforced based on the arresting officer's belief that reasonable suspicion or probable cause exists. If reliance on the reasonable beliefs of an arresting officer is considered to grant the police "unfettered discretion" as the Illinois Supreme Court claimed (App., *infra* at 16a), the whole of the criminal law would be impermissibly vague.

This Court has made clear that vagueness doctrine permits laws that provide for their enforcement based on the objectively reasonable beliefs of arresting officers. In *Boos v. Barry*, 485 U.S. 312 (1988), for example, this Court considered a vagueness attack on an ordinance prohibiting congregations near foreign embassies that had been construed to apply only when the police reasonably believed that a threat to the security or peace of the embassy was present. See *id.* at 329-30. The Court concluded that the statute, as construed, did no more than permit police to act when "normal embassy activities have been or are about to be disrupted." *Id.* at 332. This test was expressed "in words of common understanding, and it accordingly withstands . . . vagueness challenge." *Ibid.* (citations omitted). And in *Kolender*, the Court acknowledged that a loitering ordinance would be valid if it authorized investigative stops when reasonable suspicion of criminal activity is present under the standard announced in *Terry v. Ohio*, 392 U.S. 1 (1968). See 461 U.S. at 360-61. That test, of course, is an objective one, even though the police retain considerable discretion when applying it. And certainly the concept of membership in

a criminal street gang is not so amorphous that it is impossible to have objectively based beliefs on that point—as General Order 92-4 explains, there are a variety of objective indicia of membership in a criminal street gang, such as an individual's admissions, his display of distinctive signs or symbols, or the existence of information from a reliable informant. Indeed in *City of Tacoma v. Luvene*, 118 Wash. 2d 826, 827 P.2d 1374 (1992), the court rejected a vagueness attack against a loitering ordinance that permitted enforcement based on gang membership, concluding that gang membership can be objectively ascertained. See *id.* at 848 n.12, 827 P.2d at 1386 n.12.[8]

The Illinois Supreme Court reached a different result, relying on language in *Papachristou* that suggests that laws are impermissibly vague when they "make[] criminal activities which by modern standards are normally innocent." App., *infra* at 9a (quoting *Papachristou*, 405 U.S. at 163). The ordinance invalidated in that case was so broad that it could reach virtually any person walking in Jacksonville, and for that reason lent itself to arbitrary and discriminatory enforcement (see 405 U.S. at 168-71), rather than confining its reach to those who have disobeyed a police order issued under an objective standard. But largely because of the uncertain reach of *Papachristou*, the lower courts are in disarray about the constitutionality of loitering ordinances that require arresting officers to apply objective tests to determine which loiterers are subject to arrest.

The Model Penal Code, for example, contains a loitering ordinance prohibiting loitering "in a place, at a time,

[8] Many jurisdictions have made gang membership an element of an offense or a basis for sentencing enhancement, and vagueness attacks on such enactments have been repeatedly rejected. See, *e.g.*, *People v. Gardeley*, 14 Cal. 4th 605, 623-24, 927 P.2d 713, 724-25, 59 Cal. Rptr. 356, 367-68 (1996), cert. denied, 118 S. Ct. 148 (1997); *Jackson v. State*, 634 N.E.2d 532, 535-36 (Ind. App. 1994); *Helton v. State*, 624 N.E.2d 499, 505-07 (Ind. App. 1993); *State v. Walker*, 506 N.W.2d 430, 431-32 (Iowa 1993).

or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity." American Law Institute, *Model Penal Code* § 250.6 (1905). Courts have reached conflicting results when evaluating enactments based on this model. A number of courts believe that this type of ordinance adequately cabins enforcement discretion, since it requires police officers to have objectively reasonable beliefs about whether loiterers' presence warrants alarm.[9] Yet other courts have found laws modeled on the Model Penal Code to be impermissibly vague because of their potential to reach persons engaged in innocent conduct.[10] The same pattern emerges in cases considering prohibitions on loitering with intent to engage in a particular crime. Some courts have upheld such ordinances, reasoning that they require police officers to have objectively reasonable beliefs about the intent of loiterers.[11] But again, other

[9] See *State v. Ecker*, 311 So. 2d 104 (Fla.), cert. denied, 423 U.S. 1019 (1975); *Bell v. State*, 252 Ga. 267, 313 S.E.2d 678 (1984); *Salt Lake City v. Savage*, 541 P.2d 1035 (Utah 1975), cert. denied, 425 U.S. 915 (1976); *City of Milwaukee v. Nelson*, 149 Wis. 2d 434, 439 N.W.2d 562, cert. denied, 493 U.S. 858 (1989).

[10] See *United States ex rel. Newsome v. Malcolm*, 492 F.2d 1166, 1171-74 (2d Cir. 1974), aff'd on other grounds sub nom. *Lefkowitz v. Newsome*, 420 U.S. 283 (1975); *State v. Bitt*, 118 Idaho 584, 798 P.2d 43 (1990); *City of Portland v. White*, 9 Or. App. 239, 495 P.2d 778 (1972); *City of Bellevue v. Miller*, 85 Wash. 2d 539, 536 P.2d 603 (1975).

[11] See *State ex rel. Williams v. City Court*, 21 Ariz. App. 489, 520 P.2d 1166 (1974) (loitering for the purpose of begging); *Lambert v. City of Atlanta*, 242 Ga. 645, 250 S.E.2d 456 (1978) (loitering for purposes of prostitution); *People v. Superior Court*, 46 Cal. 3d 381, 758 P.2d 1046, 250 Cal. Rptr. 515 (1988) (loitering to engage in lewd behavior); *State v. Armstrong*, 282 Minn. 39, 162 N.W.2d 357 (1968) (loitering with intent to commit a crime); *People v. Smith*, 44 N.Y.2d 613, 378 N.E.2d 1032, 407 N.Y.S.2d 462 (1978) (loitering for the purpose of engaging in prostitution); *People v. Pagnotta*, 25 N.Y.2d 333, 253 N.E.2d 202, 305 N.Y.S.2d 484 (1969) (loitering for the purpose of using narcotics); *State*

courts have held that such ordinances are impermissibly vague because they believe that a police officer's view about a loiterer's intent is inherently unreliable, and thus likely to reach persons engaged in innocent activities.[12]

The same split of authority emerges when courts review other laws that can reach arguably innocuous or inoffensive conduct. For example, courts have disagreed on the validity of laws based on the Model Penal Code's anti-noise ordinance, prohibiting "unreasonable" noise "with purpose to cause public inconvenience, or alarm, or recklessly creating a risk thereof." *Model Penal Code* § 250.2 (1)(b). Some courts uphold such ordinances based on their objective character,[13] while others find that this standard may reach noise that is not actually offensive.[14] "Cruising" ordinances—forbidding driving past a certain location more than a specified number of times during a given period—have also encountered inconsistent judicial treatment for this same reason.[15] This pattern may be clearest in cases considering ordinances that forbid sleeping in public. Some courts uphold these ordinances,[16] but others find them vague since they may reach innocuous conduct.[17] And in this case as well, what the court found critical, relying on *Papachristou*, is that the gang loitering ordinance "fails to distinguish between innocent conduct and conduct calculated to cause harm and 'makes criminal activities which by modern standards are normally innocent.'" App., *infra* at 9a (quoting 406 U.S. at 163).

This injection into vagueness doctrine of the issue of what types of conduct should be deemed innocent and inoffensive is misplaced. Surely legislatures and not courts should decide whether a type of conduct has created a sufficiently serious threat to public order to justify a prophylactic prohibition. In our view, as long as people receive notice of what they must do through an order to move along that is itself based on an objective standard, they may not complain of vagueness. Yet, the court below—and a number of other courts—relied on *Papa-*

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ex rel. Juvenile Department v. D., 27 Or. App. 861, 557 P.2d 687 (1976) (loitering to engage in prostitution), appeal dismissed, 434 U.S. 914 (1977); *City of Tacoma v. Luvene*, 118 Wash. 2d 826, 827 P.2d 1374 (1992) (loitering to engage in drug-related activity); *City of Seattle v. Jones*, 79 Wash. 2d 626, 488 P.2d 750 (1971) (loitering with intent to engage in prostitution); *City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 291 N.W.2d 452 (1980) (same).

[12] See *Northern Virginia Chapter, American Civil Liberties Union v. City of Alexandria*, 747 F. Supp. 324 (E.D. Va. 1990) (loitering to engage in drug transactions); *Johnson v. Carson*, 569 F. Supp. 974 (M.D. Fla. 1983) (loitering to engage in prostitution); *Brown v. Municipality of Anchorage*, 584 P.2d 35 (Alaska 1978) (same); *People v. Gibson*, 184 Colo. 444, 521 P.2d 774 (1974) (loitering to engage in deviate sexual intercourse); *E.L. v. State*, 619 So. 2d 252 (Fla. 1993) (loitering to engage in drug-related activity); *Wyche v. State*, 619 So. 2d 231 (Fla. 1993) (loitering to engage in prostitution); *City of South Bend v. Bowman*, 434 N.E.2d 104 (Ind. App. 1982) (loitering to engage in sexual activity); *City of Akron v. Rowland*, 67 Ohio St. 3d 374, 618 N.E.2d 138 (1993) (loitering to engage in drug-related activity); *Coleman v. City of Richmond*, 5 Va. App. 459, 364 S.E.2d 239 (1988) (loitering with intent to engage in prostitution).

[13] See *Price v. State*, 622 N.E.2d 954, 966-67 (Ind. 1993); *People v. Bakolas*, 59 N.Y.2d 51, 449 N.E.2d 738, 462 N.Y.S.2d 844 (1983) (per curiam); *Commonwealth v. Mastrangelo*, 489 Pa. 254, 414 A.2d 54, appeal dismissed, 449 U.S. 894 (1980).

[14] See *Langford v. City of Omaha*, 755 F. Supp. 1460, 1462-63 (D. Neb. 1989); *Marks v. City of Anchorage*, 500 P.2d 644, 652-53 (Alaska 1972).

[15] Compare *Lutz v. City of York*, 899 F.2d 255, 270-71 (3d Cir. 1990) (upholding ordinance) and *Brandmiller v. Arreola*, 199 Wis. 2d 528, 546-48, 544 N.W.2d 894, 901-02 (1996) (same) with *State v. Stallman*, 519 N.W.2d 903 (Minn. App. 1994) (invalidating ordinance).

[16] See *Seeley v. State*, 655 P.2d 803 (Ariz. App. 1982); *People v. Davenport*, 176 Cal. App. 3d Supp. 10, 222 Cal. Rptr. 736 (App. Dep't Super. Ct. 1985), cert. denied, 475 U.S. 1141 (1986).

[17] See *Horn v. City of Montgomery*, 619 So. 2d 949 (Ala. Crim. App. 1993); *City of Pompano Beach v. Capalbo*, 455 So. 2d 468 (Fla. Dist. Ct. App. 1984), cert. denied, 474 U.S. 824 (1985); *State v. Penley*, 276 So. 2d 180 (Fla. Dist. Ct. App. 1973).

christou to conclude that a law's potential to reach people whose hearts are pure is enough to make it vague.

This disagreement in the lower courts about the scope of vagueness doctrine is unlikely to resolve itself without guidance from this Court. In the 25 years since *Papachristou,* the lower courts have been unable to agree on whether laws that can reach arguably inoffensive conduct should be condemned for that reason. As one commentator recently observed in her valuable article, "[t]he overall pattern of decisions . . . is erratic, fractured, and confusing rather than resolutely arrayed against the constitutional validity of public order laws." Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing,* 97 Colum. L. Rev. 551, 628 (1997). This Court should now decide which reading of *Papachristou* is correct, or modify *Papachristou*'s holding if necessary, to prevent further confusion in the future.

2. The Illinois Supreme Court's substantive due process holding was even further off the mark. Under substantive due process principles, an enactment that infringes no fundamental liberty need only be rationally related to a legitimate governmental interest. See, *e.g., Washington v. Glucksberg,* 117 S. Ct. 2258, 2271-72 (1997); *Reno v. Flores,* 507 U.S. 292, 301-03 (1993). And contrary to the conclusion of the court below, our Constitution recognizes no fundamental right to loiter.

The Illinois Supreme Court discerned a "general right to associate with others" (App., *infra* at 18a), but this Court has rejected such a right. As the Court explained in *Roberts v. United States Jaycees,* 468 U.S. 609 (1984), the right to associate is protected only in two senses: when undertaken to engage in the "intimate human relationships" attendant to the "creation and sustenance of a family—marriage; childbirth; the raising and education of children; and the cohabitation with one's relatives" (*id.* at 617, 619), or when undertaken for the purpose of

engaging in activities otherwise protected by the First Amendment such as "speech, assembly, petition for the redress of grievances, and the exercise of religion" (*id.* at 618). Neither of these contexts is involved in this case.

As for intimate relationships, the ordinance applies only to those who hang about in public places doing nothing apparent, hardly the type of intimate personal activity to which the Court referred in *Roberts.* As for First Amendment associational rights, precisely because the ordinance defines "loiter" as "to remain in any one place with no apparent purpose" (App., *infra* at 61a), it will rarely if ever apply to those who have assembled for the purpose of protected activity, such as picketing or protests. After all, it is hardly a protest, for example, when a gathering has no "apparent purpose." Respondents have not even claimed that the ordinance has been applied to protests or other joint advocacy activities.

Indeed, any suggestion that the rights of free speech and assembly reaches merely standing on a public way, simply because one intends to talk to someone else, runs square into *City of Dallas v. Stanglin,* 490 U.S. 19 (1989), in which the Court firmly rejected the existence of a generalized right of "social association" rooted in the First Amendment. See *id.* at 25. While those challenging the dance-hall ordinance at issue in that case claimed that it infringed a fundamental First Amendment right to be with others, the Court disagreed: "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Ibid.* Similarly, in *Colten v. Kentucky,* the Court rejected with equal clarity Colten's claim that he had a First Amendment right to remain on a public sidewalk even after having been ordered

to move by a police officer, merely because he desired to engage the officer in debate. See 407 U.S. at 109.[18]

The Illinois Supreme Court's invocation of the "right to travel" and the "right of locomotion" (App., *infra* at 18a) is even more misplaced. Whatever protections the concept of substantive due process offers to these activities, surely loitering is the antithesis of travel. If gang members and their associates only keep on walking—exercising the very right to travel they claim is infringed by the ordinance—they will not be subject to arrest.

Aside from its incorrect reliance on associational and travel rights, the Illinois Supreme Court relied only on *Papachristou* for the conclusion that the right to loiter is a traditional "amenit[y] of American life." App., *infra* at 17a. In fact, history and tradition point the other way; as we explain below, there is a long legacy in our country of regulating loitering. And to the extent that language in *Papachristou* suggests that loitering laws are suspect because they have the potential to reach conduct that is innocuous in nature, it represents a brand of substantive due process that surely should be interred. Enactment of all prophylactic laws involves weighing the benefits of prophylaxis against the cost of prohibiting conduct that is sometimes innocent. The Constitution provides no basis for courts to invalidate such laws merely because they disagree with the legislative assessment of costs and benefits; such a jurisprudence harkens back to the bygone era of *Lochner v. New York*, 198 U.S. 45 (1905).

The California Supreme Court, in its recent decision in *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 929 P.2d 596, 60 Cal. Rptr. 2d 277, cert. denied, 117 S. Ct. 2513 (1997), took precisely the opposite view from the court

[18] Thus, although the court below stated that it need not reach respondents' argument that the ordinance infringes associational rights (App., *infra* at 19a), that argument suffers from the same defect as the associational rights on which the court relied to support its substantive due process holding.

below, finding that an injunction prohibiting gang members from associating together in public infringed no constitutionally protected interest. The court reasoned that gang members could assert at most the kind of generalized right of social association rejected in *Stanglin*, since there was no showing that their loitering involved either intimate and private activity or joint political or social advocacy. See *id.* at 1110-12, 929 P.2d at 608-09, 60 Cal. Rptr. at 289-90. Cf. *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996) (upholding loitering ordinance that prohibited sitting or lying in the sidewalk); *Lutz v. City of York*, 899 F.2d 255, 266-70 (3d Cir. 1990) (law restricting vehicular cruising upheld). That approach should have been taken in this case as well.

Here, the gang loitering ordinance infringes the "liberty" interest in using the public ways only to a limited extent—anyone can loiter alone, or even with others, including criminal street gang members, as long as they move along when directed to do so. Of course, despite the City Council's attempts to craft the narrowest ordinance that would still address the baneful consequences of gang loitering, we do not contend that the ordinance could never be applied to persons whose conduct may in fact be innocuous or inoffensive. But a potential for application to "innocent" conduct does not give rise to a substantive due process violation. Here, the City Council reasonably concluded that the need to remove the visibly lawless element of loiterers from the public ways—because their loitering itself destabilizes communities, lowers property values, and intimidates law-abiding residents—justified whatever burden is imposed on persons engaged in "innocent" activity who are directed to move along as a result of this ordinance. Because that judgment is rationally related to legitimate governmental objectives, it should not have been set at naught in the name of substantive due process.[19]

[19] The Illinois Supreme Court did not reach respondents' arguments that the ordinance is overbroad, creates a status offense, and

3. Loitering laws have a considerable pedigree. And, if not unduly restrained, an important future. English loitering and vagrancy laws date to the fourteenth century, and have been widely employed in this country since the American Revolution. See *Model Penal Code* § 250.6, comment 1. See also, *e.g.*, Jeffrey S. Adler, *A Historical Analysis of the Law of Vagrancy*, 27 Criminology 209 (1989); Robert Force, *Decriminalization of Breach of the Peace Statutes: A Nonpenal Approach to Order Maintenance*, 46 Tul. L. Rev. 367 (1972).

Interest in enforcement of public order laws has been renewed by the emergence of community-oriented policing and its theoretical underpinning—the "Broken Windows" thesis first advanced by Professors James Q. Wilson and George Kelling. They observed that in the wake of the professionalization of policing in the 1950s and 1960s, law enforcement had stressed strategies based on investigating those crimes thought to be most serious, thereby

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authorizes arrests without probable cause. What we have explained above largely answers these arguments as well. To be overbroad, a law must reach a substantial quantum of conduct protected by the First Amendment. *E.g.*, *New York v. Ferber*, 458 U.S. 747, 769-73 (1982). Because this ordinance prohibits only loitering, it will rarely if ever reach protests, picketing, or other protected conduct, which is conduct with an "apparent purpose." Thus, the ordinance is not substantially overbroad. The ordinance also does not create a status offense because it requires conduct—loitering plus disobedience of a police order—and laws requiring "some *actus reus*" are not considered status offenses. *Powell v. Texas*, 392 U.S. 514, 533 (1968). Nor does the ordinance authorize arrests without probable cause. The order to move is not itself a "seizure" subject to Fourth Amendment review because it does not restrain the person receiving the order. See *California v. Hodari D.*, 499 U.S. 621, 629 (1991). And since no arrest can occur until there is probable cause to believe that the police order has been disobeyed, this type of ordinance is consistent with the Fourth Amendment. See *City of Milwaukee v. Nelson*, 149 Wis. 2d at 454-62, 439 N.W.2d at 569-72 (as long as probable cause exists to believe defendant was loitering in violation of ordinance, loitering arrests comport with the Fourth Amendment).

overlooking the important function that public order maintenance served. See James Q. Wilson & George L. Kelling, *Broken Windows*, Atlantic Monthly, Mar. 1982, at 33-38. See also, *e.g.*, Egon Bittner, *Aspects of Police Work* 12-13, 133-62 (1990); George L. Kelling & Catherine M. Coles, *Fixing Broken Windows* 82-107 (1996); Charles R. Swanson, Leonard Territo & Robert W. Taylor, *Police Administration: Structures, Processes and Behavior* 3-29 (3d ed. 1993); Samuel Walker, *The Police in America* 12-39 (1992). The "Broken Windows" thesis is that crime is most effectively combatted when the police can address signs of visible disorder—including loitering—that destabilize communities and stimulate the commission of more serious crimes. See, *e.g.*, Kelling & Coles, *supra* at 16-36; Wesley G. Skogan, *Disorder and Decline*, 9-10, 51-57, 73-75 (1990); Jerome H. Skolnick & David H. Bayley, *Community Policing: Issues and Practices Around the World* 4-19 (Nat'l Ins. of Justice 1988); Wilson & Kelling, *supra* at 31-33. In light of these insights, commentators have repeatedly called for courts to provide greater leeway to state and local governments to address signs of chronic disorder on the streets. See, *e.g.*, Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows and Public Zoning*, 105 Yale L.J. 1165, 1177-84, 1238-46 (1996); Livingston, *supra* at 650-72.

Thus, loitering laws are an important part of modern proactive and preventive policing strategies. As Professor Dan Kahan of the University of Chicago Law School has observed:

> The public presence of gangs, like other visible signs of disorder, emboldens law-breakers and frightens law-abiders.
>
> Even more disturbing, visible gang activity drives a wedge between neighborhoods and the police. When law-abiding citizens see gang members congregating on the streets, they infer that cooperating with law-enforcement officials is futile and dangerous.

> And their reluctance to report law breaking predictably leads to more of it.
>
> Giving the police the power to suppress open gang activity is thus an important tool for repairing community norms that sustain law-abiding behavior.

Dan N. Kahan, *Defending the Gang-Loitering Law*, Chicago Trib., Dec. 31, 1995, § 1 at 19.

The Illinois Supreme Court denigrated the necessity of loitering ordinances observing that "[many] of the offensive activities the city claims the gang loitering ordinance will deter are already criminal acts." App., *infra* at 19a. But surely it is no answer to law-abiding residents, who no longer feel safe when they go outdoors, that someone may eventually be prosecuted on a serious felony charge—if proof beyond a reasonable doubt can be assembled. And under the decision below, it is difficult to imagine how any loitering ordinance could be upheld. The Illinois Supreme Court has condemned a prohibition on loitering as fatally vague even though police officers enforce those prohibitions by using objective tests, and even though persons are given actual notice that they are loitering in an impermissible manner prior to arrest.

4. The broadest language in *Papachristou*, coupled with decisions like the one below, also creates significant practical inhibitions on the exercise of state and local police powers in jurisdictions in which the law is not yet settled. Local governments in those jurisdictions may well be inhibited from experimentation by the fear of liability under 42 U.S.C. § 1983, which accrues without any qualified immunity. See *Owen v. City of Independence*, 445 U.S. 622 (1980). Any loitering ordinance, especially when enacted in a city of substantial size, will necessarily result in a large number of arrests, and accordingly will generate immense potential liability should the ordinance ultimately be found to be unconstitutional. Thus, guidance

from this Court on the scope of *Papachristou* is all the more urgent.

* * * *

With the growth of community-oriented policing, and its new emphasis on enforcement of public order offenses as part of an effort to promote stability in local communities, loitering laws have come to be recognized as an important weapon in the arsenal of law enforcement. *Papachristou*, however, casts a considerable legal cloud over the authority of local governments to enforce such public order offenses. The uncertainties that its broadest language have created are amply reflected in the confusing and conflicting lines of precedent that it has spawned. As Professor Livingston has observed, clarification of the law in this area "is thus important in an era in which community and problem-oriented policing styles, with their heightened emphasis on quality-of-life problems, are widespread." Livingston, *supra* at 627. Accordingly, plenary review is warranted to resolve the conflict in the lower courts, clarify the scope of state and local police powers, and grant state and local governments the breathing room they need to develop proactive and community-oriented law enforcement tools to combat gang crime.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Oct. 17, 1997]

SUPREME COURT OF ILLINOIS

Docket Nos. 80479, 80485, 80668
cons.—Agenda 12—November 1996

THE CITY OF CHICAGO,
Appellant,

v.

JESUS MORALES *et al.*,
Appellees.

JUSTICE NICKELS delivered the opinion of the court.

These consolidated appeals involve 70 defendants who were charged with violating the City of Chicago's Gang Congregation Ordinance (Chicago Municipal Code § 8-4-015 (added June 17, 1992)). In cause No. 80668, defendant Youkhana and 13 other defendants were charged with violating the ordinance. The Cook County circuit court granted defendants' motion to dismiss the city's actions against them, finding the ordinance unconstitutionally vague. The appellate court affirmed, holding the ordinance unconstitutional on several grounds. *Youkhana*, 277 Ill. App. 3d 101.

In cause No. 80485, the Cook County circuit court dismissed the charges against defendant Ramsey and 49 other defendants, also finding the ordinance unconstitutional. In cause No. 80479, after separate bench trials in the Cook County circuit court, defendant Morales and five other defendants were found guilty of violating the ordi-

nance and each sentenced to jail terms ranging from 1 to 27 days. The appellate court reversed the convictions of the *Morales* defendants based on its holding in *Youkhana* (*Morales*, Nos. 1-93-4039, 1-93-4351, 1-93-4356, 1-94-1542, 1-94-3065, 1-94-4062 cons. (unpublished order under Supreme Court Rule 23)), and affirmed the dismissal of the actions against the *Ramsey* defendants (*Ramsey*, Nos. 1-93-4125, 1-93-4126, 1-94-0220, 1-94-0876, 1-94-0877, 1-94-1541, 1-95-0191, 1-95-0246 cons. (unpublished order under Supreme Court Rule 23)). The appellate court granted the city's request for a certificate of importance in *Youkhana* (155 Ill. 2d R. 316), and this court granted the city's petitions for leave to appeal in the other two causes (155 Ill. 2d R. 315). We consolidated the three causes for purposes of this appeal.

BACKGROUND

In May 1992, the Chicago city council held hearings to explore the problems criminal street gangs present for the city's residents. Of particular concern was the problems gang members cause by loitering in public. Witnesses testified how gang members loiter as part of a strategy to claim territory, recruit new members, and intimidate rival gangs and ordinary community residents. Testimony revealed that street gangs are responsible for a variety of criminal activity, including drive-by shootings, drug dealing, and vandalism.

As a result of the hearings, the city council enacted the Gang Congregation Ordinance, more commonly known as the "gang loitering ordinance." The city council incorporated its findings in the preamble to the ordinance, as follows:

> "WHEREAS, The City of Chicago, like other cities across the nation, has been experiencing an increasing murder rate as well as an increase in violent and drug related crimes; and

> WHEREAS, The City Council has determined that the continuing increase in criminal street gang activity in the City is largely responsible for this unacceptable situation; and
>
> WHEREAS, In many neighborhoods throughout the City, the burgeoning presence of street gang members in public places has intimidated many law abiding citizens; and
>
> WHEREAS, One of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas; and
>
> WHEREAS, Members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present, while maintaining control over identifiable areas by continued loitering; and
>
> WHEREAS, The City Council has determined that loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity; and
>
> WHEREAS, The City also has an interest in discouraging all persons from loitering in public places with criminal gang members; and
>
> WHEREAS, Aggressive action is necessary to preserve the city's streets and other public places so that the public may use such places without fear[.]" Chicago Municipal Code § 8-4-015 (added June 17, 1992).

The gang loitering ordinance provides in pertinent part:

> "(a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street

gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

(b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.

(c) As used in this section:

(1) 'Loiter' means to remain in any one place with no apparent purpose.

(2) 'Criminal street gang' means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

* * * *

(5) 'Public place' means the public way and any other location open to the public, whether publicly or privately owned." Chicago Municipal Code § 8-4-015 (added June 17, 1992).

Each violation of the ordinance is punishable by a fine of up to $500, imprisonment for not more than six months, and the requirement to perform up to 120 hours of community service.

During the hearings, representatives of the Chicago law and police departments informed the city council that any limitations on the discretion police have in enforcing the ordinance would be best developed through police policy, rather than placing such limitations into the ordi-

nance itself. Accordingly, after the gang loitering ordinance was enacted, the Chicago police department issued a general order which provides guidelines for enforcement of the ordinance. Among other things, the general order sets forth standards for identifying criminal street gangs and specifies criteria for establishing probable cause that an individual is a member of a criminal street gang. Chicago Police Department, General Order No. 92-4 (eff. August 8, 1992).

Once enforcement of the gang loitering ordinance began, the circuit courts of Cook County disagreed as to its validity. Upon review, the appellate court held the ordinance unconstitutional on several grounds. First, the appellate court found the ordinance unconstitutionally overbroad because it violates the first amendment rights of association, assembly, and expression. In addition, the appellate court found that the ordinance was unconstitutionally vague. Next, the appellate court determined the ordinance criminalizes a person's status in violation of the eighth amendment. Finally, the appellate court determined the ordinance allows arrests without probable cause, in violation of the fourth amendment. *Youkhana*, 277 Ill. App. 3d 101.

The city urges that the judgment of the appellate court be reversed because the gang loitering ordinance: (1) sufficiently defines criminal conduct such that it is not unconstitutionally vague; (2) is not overbroad because it is a permissible restriction of first amendment rights; (3) does not create a status offense; and (4) requires the police to establish probable cause of illegal conduct before an offender can be arrested.

We find that the gang loitering ordinance violates due process of law in that it is impermissibly vague on its face and an arbitrary restriction on personal liberties. In doing so, we need not reach the issues that the ordinance creates a status offense, permits arrests without probable cause or is overbroad.

ANALYSIS

In construing a municipal ordinance, the same rules are applied as those which govern the construction of statutes. *In re Application of the County Collector*, 132 Ill. 2d 64, 72 (1989). Statutes are presumed constitutional and it is the court's duty to construe a legislative enactment so as to affirm its constitutionality and validity, if it is reasonably susceptible to such a construction. *People v. Haywood*, 118 Ill. 2d 263, 271 (1987). The fundamental rule of statutory construction is to ascertain and give effect to the true intent and meaning of the lawmakers. *Solich v. George & Anna Portes Cancer Prevention Center of Chicago, Inc.*, 158 Ill. 2d 76, 81 (1994). In doing so, the courts should look first to the statutory language, for the language of the statute is the best indication of the lawmaker's intent. *Williams v. Illinois State Scholarship Comm'n*, 139 Ill. 2d 24, 51 (1990). Where the meaning of an enactment is clear and unambiguous, a court must give it effect as written, without reading into it limitations or conditions that the lawmakers did not express. *Garza v. Navistar International Transportation Corp.*, 172 Ill. 2d 373, 378 (1996). Moreover, criminal statutes are to be strictly construed in favor of an accused and nothing should be taken by intendment or implication beyond the obvious or literal meaning of the statute. *People v. Woodward*, 175 Ill. 2d 435, 444 (1997).

I. Vagueness

A cornerstone of our jurisprudence is that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const., amends. V, XIV; Ill. Const. 1970, art. I, § 2. A well-established element of the guarantees of due process is the requirement that the proscriptions of a criminal statute be clearly defined. *Haywood*, 118 Ill. 2d at 269, citing *Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 227, 92 S. Ct. 2298,

2298-99 (1972). To successfully challenge a criminal statute as being vague on its face, the statute must be impermissibly vague in all of its applications. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 71 L. Ed. 2d 362, 369, 102 S. Ct. 1186, 1191 (1982); *Haywood*, 118 Ill. 2d at 270. That is, the statute must be shown to be vague "in the sense that no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 29 L. Ed. 2d 214, 217, 91 S. Ct. 1686, 1688 (1971). If on its face the challenged statute violates the due process clause, then the specific details of the individual offense would not serve to validate the statute. *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 83 L. Ed. 888, 890, 59 S. Ct. 618, 619 (1939).

To satisfy the vagueness doctrine, a criminal statute must meet two basic criteria. First, a criminal statute must be sufficiently definite so that it gives persons of ordinary intelligence a reasonable opportunity to distinguish between lawful and unlawful conduct. *Kolender v. Lawson*, 461 U.S. 352, 357, 75 L. Ed. 2d 903, 909, 103 S. Ct. 1855, 1858 (1983); *Grayned*, 408 U.S. at 108, 33 L. Ed. 2d at 227, 92 S. Ct. at 2298-99; *People v. Bailey*, 167 Ill. 2d 210, 228 (1995). Second, a penal statute must adequately define the criminal offense in such a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender*, 461 U.S. at 357-58, 75 L. Ed. 2d at 909, 103 S. Ct. at 1858; *Haywood*, 118 Ill. 2d at 269; see also *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 31 L. Ed. 2d 110, 115, 92 S. Ct. 839, 843 (1972). We evaluate the provisions of the gang loitering ordinance in light of the due process criteria.

A. *Adequate Notice*

The first criterion of the void-for-vagueness doctrine requires a criminal statute to be sufficiently defined so it provides persons of ordinary intelligence adequate notice of proscribed conduct. *Kolender*, 461 U.S. at 357, 75

L. Ed. 2d at 909, 103 S. Ct. at 1858; *Grayned*, 408 U.S. at 108, 33 L. Ed. 2d at 227, 92 S. Ct. at 2298-99; *Bailey*, 167 Ill. 2d at 228. Due process guarantees this adequate notice of proscribed conduct so that ordinary persons are not required to guess at a law's meaning but, rather, can know what conduct is forbidden and act accordingly. *Flipside, Hoffman Estates, Inc.*, 455 U.S. at 498, 71 L. Ed. 2d at 371, 102 S. Ct. at 1193; *Connally v. General Construction Co.*, 269 U.S. 385, 391, 70 L. Ed. 322, 328, 46 S. Ct. 126, 127 (1926). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta*, 306 U.S. at 453, 83 L. Ed. at 890, 59 S. Ct. at 619.

Loitering and vagrancy statutes have been utilized throughout American history in an attempt to prevent crime by removing "undesirable persons" from public before they have the opportunity to engage in criminal activity. See *Papachristou*, 405 U.S. at 161-63, 31 L. Ed. 2d at 114-16, 92 S. Ct. at 842-44; see generally Model Penal Code § 250.6, Commentary (1980); Comment, *Is There Something Suspicious About the Constitutionality of Loitering Laws?*, 50 Ohio St. L.J. 717 (1989). Nevertheless, it is well settled that broadly worded criminal loitering laws which prohibit loitering without additional unlawful conduct are doubtlessly unconstitutional. See, *e.g.*, *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90, 15 L. Ed. 2d 176, 179, 86 S. Ct. 211, 213 (1965).

The gang loitering ordinance provides that "[w]henever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section." Chicago Municipal Code § 8-4-015 (added June 17, 1992).

The city argues that the terms of the ordinance are sufficiently definite so that ordinary persons can comprehend the prohibited conduct. We disagree.

The ordinance seeks to criminalize acts of "loitering" in a public place. Webster's defines "loiter" to mean "to remain in or near a place in an idle or apparently idle manner" and to "hang around aimlessly." Webster's Third New International Dictionary 1331 (1981). The infirmity with this type of prohibition is that it fails to distinguish between innocent conduct and conduct calculated to cause harm and "makes criminal activities which by modern standards are normally innocent" (*Papachristou*, 405 U.S. at 163, 31 L. Ed. 2d at 116. 92 S. Ct. at 844). Although persons of ordinary intelligence may maintain a common and accepted meaning of the word "loiter," such term by itself is inadequate to inform a citizen of its criminal implications. See *Territory of Hawaii v. Anduha*, 48 F.2d 171, 172-73 (9th Cir. 1931); *Arizona ex rel. Williams v. City Court*, 21 Ariz. App. 489, 491, 520 P.2d 1166, 1168 (1974); *State v. Hudson*, 111 N.H. 25, 26 274 A.2d 878, 879 (1971); *People v. Diaz*, 4 N.Y.2d 469, 471, 151 N.E.2d 871, 872, 716 N.Y.S.2d 313, 315 (1958).

The city cites *Wiemerslage v. Maine Township High School District 207*, 29 F.3d 1149 (7th Cir. 1994), for the proposition that the term "loiter" is not unconstitutionally vague. The *Wiemerslage* holding is not applicable to the instant case. At issue in *Wiemerslage* was the validity of a high school disciplinary rule prohibiting loitering in a specific area of campus. The federal court of appeals, in finding that the prohibitions of the disciplinary rule were not vague, expressly observed that criminal loitering laws are subject to a more stringent standard of specificity. *Wiemerslage*, 29 F.3d at 1152.

Moreover, the definition of "loiter" provided by the ordinance does not assist in clearly articulating the proscriptions of the ordinance. The ordinance defines "loiter"

to mean "to remain in any one place with no apparent purpose." Chicago Municipal Code § 8-4-015(c)(1) (added June 17, 1992). People with entirely legitimate and lawful purposes will not always be able to make their purposes apparent to an observing police officer. For example, a person waiting to hail a taxi, resting on a corner during a jog, or stepping into a doorway to evade a rain shower has a perfectly legitimate purpose in all these scenarios; however, that purpose will rarely be apparent to an observer.

Courts in several other jurisdictions have found similarly worded prohibitions of criminal loitering statutes unconstitutionally vague. See, *e.g.*, *United States ex rel. Newsome v. Malcolm*, 492 F.2d 1166 (2d Cir. 1974) (loitering without apparent reason), *aff'd sub nom. Lefkowitz v. Newsome*, 420 U.S. 283, 43 L. Ed. 2d 196, 95 S. Ct. 886 (1975); *Powell v. Stone*, 507 F.2d 93, 95 (9th Cir. 1974) (loitering without apparent reason), *rev'd on other grounds*, 428 U.S. 465, 49 L. Ed. 2d 1067, 96 S. Ct. 3037 (1976); *Ricks v. District of Columbia*, 414 F.2d 1097, 1107 (D.C. Cir. 1968) (loitering without visible business); *Kirkwood v. Loeb*, 323 F. Supp. 611, 614-15 (W.D. Tenn. 1971) (loitering without any legitimate purpose); *In re C.M.*, 630 P.2d 593, 596 (Colo. 1981) (loitering without legitimate reason); *People v. Berck*, 32 N.Y.2d 567, 300 N.E.2d 411, 347 N.Y.S.2d 33 (1973) (loitering without apparent reason).

In addition, the city cites several cases for the proposition that an ordinance prohibiting loitering alone is sufficiently defined to pass the void-for-vagueness test. However, in all of the cases cited by the city, the courts upheld ordinances which criminalized loitering combined with some other overt act or criminal intent. See, *e.g.*, *Williams*, 21 Ariz. App. at 491, 520 P.2d at 1168 (loitering for purpose of begging); *People v. Superior Court*, 46 Cal. 3d 381, 758 P.2d 1046, 250 Cal. Rptr. 515 (1988) (loitering to solicit lewd or unlawful act);

State v. Ecker, 311 So. 2d 104 (Fla. 1975) (loitering in an unusual manner under circumstances which warrant alarm); *Bell v. State*, 252 Ga. 267, 313 S.E.2d 678 (1984) (same); *State v. Armstrong*, 282 Minn. 39, 162 N.W.2d 357 (1968) (loitering with intent to solicit prostitution). Moreover, several of the cases cited by the city expressly recognize that a law which criminalizes "loitering" alone would be unconstitutionally vague. See, *e.g.*, *Williams*, 21 Ariz. App. at 491, 520 P.2d at 1168; *Ecker*, 311 So. 2d at 107; *Camarco v. City of Orange*, 116 N.J. Super. 531, 534, 283 A.2d 122, 16 (1971). The city's argument is without merit.

These cases demonstrate that when the term "loitering" is joined with a second specific element to form the prohibited conduct defined by a criminal loitering statute, courts have uniformly found that the law sufficiently informs persons as to the forbidden conduct and, thus, is not vague. The city contends, in the alternative, that the gang loitering ordinance's prohibited conduct is made up of specific elements in addition to mere loitering.

1. Loitering With a Criminal Street Gang Member

First, the city argues that the ordinance prohibits loitering with the additional element of being with a member of a criminal street gang. Initially, we must observe that, literally read, the gang loitering ordinance does not prohibit loitering with a criminal street gang member. Rather, the ordinance requires only that the arresting officer have a reasonable belief that one person in a group of loiterers is a gang member.

However, a reasonable belief, or probable cause, is insufficient to support a criminal conviction. See *People v. Nash*, 173 Ill. 2d 423, 431 (1996). In addition, this added element is itself vague, as it conveys no precise warning of the proscribed conduct understandable by an ordinary person. An individual standing on a street corner with a group of people has no way of knowing

whether an approaching police officer has a reasonable belief that the group contains a member of a criminal street gang. That condition depends solely on the police officer's subjective evaluation of the facts of the situation in light of his own experience. See *Kolender*, 461 U.S. at 368-69, 75 L. Ed. 2d at 916, 103 S. Ct. at 1864 (Brennan, J., concurring).

If the city intended to require actual knowledge on a defendant's part of another loiterer's gang membership, then that knowledge must be established as a fact in order to support a conviction. See *Lanzetta*, 306 U.S. at 458, 83 L. Ed. at 893, 59 S. Ct. at 621; accord *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 929 P.2d 596, 60 Cal. Rptr. 2d 277 (1997) (imposing requirement of actual knowledge on part of defendant of other party's gang membership status in order for injunction to pass scrutiny under the vagueness doctrine). Although the ordinance provides an affirmative defense which allows the defendant to show that no one in the group was actually a gang member, this affirmative defense does not cure the defect. Showing that one person in a group of loiterers is a gang member does not ultimately prove that a defendant had knowledge of that fact. Furthermore, even adding a knowing association with a gang member to the act of loitering is still insufficient because the city cannot "forbid, on pain of criminal punishment, assembly with others merely to advocate activity, even if that activity is criminal in nature" (*People v. Nash*, 173 Ill. 2d 423, 431-32 (1996), citing *Brandenburg v. Ohio*, 395 U.S. 444, 448-49, 23 L. Ed. 2d 430, 434-35, 89 S. Ct. 1827, 1830 (1969)).

2. Failure to Obey a Dispersal Order

The city contends that another specific element of the offense of gang loitering is the failure to obey a police order to disperse. This is also insufficient to cure the vagueness of the ordinance. In *Shuttlesworth*, the Supreme Court reviewed a conviction pursuant to an ordinance which made it " 'unlawful for any person to stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on.' " *Shuttlesworth*, 382 U.S. at 90-92, 15 L. Ed. 2d at 179-80, 86 S. Ct. at 213-14. The Court determined that, as written, the ordinance was unconstitutionally vague because it allowed a person to "stand on a public sidewalk *** only at the whim of any police officer." *Shuttlesworth*, 382 U.S. at 90-92, 15 L. Ed. 2d at 179-80, 86 S. Ct. at 213-14.

The proscriptions of the gang loitering ordinance are essentially the same as the *Shuttlesworth* ordinance. Merely adding the elements of refusing to obey an order by police to disperse does not elevate the gang loitering ordinance to such a level that it provides adequate notice of proscribed conduct. See *State v. Hudson*, 111 N.H. at 26, 274 A.2d at 879 (merely loitering cannot be made criminal, even if statute requires refusal of police's order to disperse); *Kirkwood*, 323 F. Supp. at 616 (violation of loitering ordinance conditioned upon failure to move when directed to do so by police officer includes unconstitutionally vague standards). Moreover, this determination is consistent with our prior holdings. See, *e.g.*, *City of Chicago v. Meyer*, 44 Ill. 2d 1, 5 (1969) (police may arrest persons for failing to obey an order to cease otherwise lawful conduct, but only after the police have made all reasonable efforts to maintain order and the conduct produces an imminent threat of uncontrollable violence or riot).

Furthermore, if the underlying statute is itself impermissibly vague, as the gang loitering ordinance here, then a conviction based upon failure to obey the order of a police officer pursuant to that statute cannot stand. See *Shuttlesworth*, 382 U.S. at 90-92, 15 L. Ed. 2d at 179-80, 86 S. Ct. at 213-14. The city correctly observes that it is free to prevent people from obstructing traffic and blocking the public way. However, it must do so "through the

enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited." *Coates*, 402 U.S. at 614, 29 L. Ed. 2d at 217, 91 S. Ct. at 1688, citing *Gregory v. City of Chicago*, 394 U.S. 111, 118, 124-25, 22 L. Ed. 2d 134-40, 139, 143, 89 S. Ct. 946, 950, 953-54 (1969) (Black, J., concurring, joined by Douglas, J.).

For these reasons, we find that the gang loitering ordinance fails to meet the adequate notice standards of the vagueness doctrine.

B. *Arbitrary Enforcement*

The second and more important aspect of the vagueness doctrine is the requirement that a penal statute must adequately define a criminal offense in such a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender*, 461 U.S. at 357-58, 75 L. Ed. 2d at 909, 103 S. Ct. at 1858; *Haywood*, 118 Ill. 2d at 269; see also *Papachristou*, 405 U.S. at 162, 31 L. Ed. 2d at 115, 92 S. Ct. at 843. Where lawmakers fail to provide minimal guidelines to govern law enforcement, a criminal law "may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " *Kolender*, 461 U.S. at 358, 75 L. Ed. 2d at 909, 103 S. Ct. at 1858, quoting *Smith v. Goguen*, 415 U.S. 566, 575, 90 L. Ed. 2d 605, 613, 94 S. Ct. 1242, 1248 (1974). Moreover, when a law fails to provide standards regulating the exercise of its discretion, "the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. [The law] furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.' " *Papachristou*, 405 U.S. at 170, 31 L. Ed. 2d at 120, 92 S. Ct. at 847, quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 84 L. Ed. 2d 1093, 1100, 60 S. Ct. 736, 742 (1940).

The gang loitering ordinance fails to meet these standards. The ordinance provides such ambiguous definitions of its elements that it does not discourage arbitrary or discriminatory enforcement. The definition of loitering as "to remain in any one place with no apparent purpose" provides absolute discretion to police officers to decide what activities constitute loitering. Moreover, police are given complete discretion to determine whether any members of a group are gang members. These guidelines do not conform with accepted standards for defining a criminal offense.

Where a criminal ordinance vests unfettered discretion in the police to determine whether a suspect's conduct has violated the ordinance, it "entrust[s] lawmaking 'to the moment-to-moment judgment of the policeman on his beat' " (*Smith*, 415 U.S. at 575, 39 L. Ed. 2d at 613, 94 S. Ct. at 1248, quoting *Gregory v. City of Chicago*, 394 U.S. 111, 120, 22 L. Ed. 2d 134, 141, 89 S. Ct. 946, 951 (1969) (Black, J., concurring, joined by Douglas, J.)), and "confers on police a virtually unrestrained power to arrest and charge persons with a violation" (*Lewis v. City of New Orleans*, 415 U.S. 130, 135, 39 L. Ed. 2d 214, 220, 94 S. Ct. 970, 973 (1974) (Powell, J., concurring)).

The city does not dispute that the ordinance grants the police department a vast amount of discretion in its enforcement. In fact, the city itself points out that the Chicago police department urged the city council to exclude from the ordinance any limitations on the discretion the police hold in enforcing the ordinance. Notwithstanding that fact, the city contends that the general order of the police department should be considered a limiting construction of the ordinance, thus curing its vagueness. However, the general police order does not save the ordinance from being impermissibly vague.

We observe that lawmakers may not abdicate their responsibilities for setting the standards of the criminal law.

Smith, 415 U.S. at 575, 39 L. Ed. 2d at 613, 94 S. Ct. at 1248. It is the duty of the lawmakers to establish minimal guidelines to govern law enforcement. *Kolender*, 461 U.S. at 358, 75 L. Ed. 2d at 909, 103 S. Ct. at 1858. Moreover, although the general police order goes to great lengths to define criminal street gangs, it does absolutely nothing to cure the imprecisions of the definition of the "loitering" element of the crime. In addition, a thorough examination of the record reveals that police officers have not followed the guidelines of the general order in a uniform manner.[1]

Furthermore, the gang loitering ordinance is not reasonably susceptible to a limiting construction which would affirm its validity. Although the proscriptions of the ordinance are vague, the city council's intent in its enactment is clear and unambiguous. The city has declared gang members a public menace and determined that gang members are too adept at avoiding arrest for all the other crimes they commit. Accordingly, the city council crafted an exceptionally broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets. As the Supreme Court has observed, ordinances such as the gang loitering ordinance are drafted in an intentionally vague manner so that persons who are undesirable in the eyes of police and prosecutors can be convicted even though they are not chargeable

[1] In one example, the general order provides that probable cause of a defendant's membership in a criminal street gang can be substantiated by his wearing distinctive colors indicative of a specific criminal street gang. However, the general order expressly states that gang "membership may not be established solely because an individual is wearing clothing available for sale to the general pubic." Chicago Police Department, General Order No. 92-4, par. V (eff. August 8, 1992). Despite this express limitation, defendant Morales was arrested and convicted of violating the gang loitering ordinance even though the arresting officer testified that his only basis for determining that Morales was a gang member was that Morales wore black and blue clothing, which are the colors of the Gangster Disciples criminal street gang.

with any other particular offense. *Papachristou*, 405 U.S. at 166, 31 L. Ed. 2d at 118, 92 S. Ct. at 845. Laws such as these tend "to be invoked only where there is no other valid basis for arresting an objectionable or suspicious person. The opportunity for abuse *** is self-evident." *Lewis*, 415 U.S. at 136, 39 L. Ed. 2d at 221, 94 S. Ct. at 974 (Powell, J., concurring).

We empathize with the city council's objectives in enacting the gang loitering ordinance. Criminal street gangs are an expanding cancer in our society and their illegal activities endanger the safety of many law-abiding citizens. Nevertheless, as important as it is to abate this problem, the city cannot fight gang crime through the enactment and enforcement of an ordinance that fails to meet constitutional standards for definiteness and clarity. *Kolender*, 461 U.S. at 361, 75 L. Ed. 2d at 911, 103 S. Ct. at 1860, citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 83 L. Ed. 888, 890, 59 S. Ct. 618, 619 (1939).

II. Substantive Due Process

Defendants also contend that the gang loitering ordinance is an arbitrary exercise of the city's police power and, thus, violates substantive due process. The city responds that defendants have no constitutional right to loiter. We agree with defendants.

The city is incorrect in its contention that the gang loitering ordinance intrudes upon no constitutionally protected activity. In *Papachristou*, the Supreme Court reviewed a statute which prohibited, among other things, the acts of loafing, loitering, and nightwalking. The Court observed that, although not expressly mentioned in the Constitution, such activities are amenities of American life. *Papachristou*, 405 U.S. at 164, 31 L. Ed. 2d at 117, 92 S. Ct. at 844. The freedom to engage in such harmless activities is an aspect of the personal liberties protected by the due process clause. See *City of Chicago v. Wilson*, 75 Ill. 2d 525, 529-30 (1978), citing *Kelley v. Johnson*, 425

U.S. 238, 47 L. Ed. 2d 708, 96 S. Ct. 1440 (1976); see also *Swank v. Smart*, 898 F.2d 1247, 1251-52 (7th Cir. 1990).

Among those protected personal liberties which have long been rcognized are the general right to travel (see, *e.g., Shapiro v. Thompson*, 394 U.S. 618, 629, 22 L. Ed. 2d 600, 612, 89 S. Ct. 1322, 1329 (1969) (constitutional concepts of personal liberty require that all citizens be free to travel throughout the land uninhibited by laws which unreasonably burden or restrict this movement), *overruled in part on other grounds, Edelman v. Jordan*, 415 U.S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974)), the right of locomotion (see, *e.g., Anduha*, 48 F.2d at 172, quoting *Pinkerton v. Verberg*, 78 Mich. 573, 584, 44 N.W. 579, 582 (1889) (the right to go where and when one pleases)[)], the right to freedom of movement (*Kolender*, 461 U.S. at 358, 75 L. Ed. 2d at 910, 103 S. Ct. at 1859), and the general right to associate with others (*Swank*, 898 F.2d at 1252). The gang loitering ordinance impedes upon all of these personal liberty interests.

We recognize that such personal liberties are not absolute. Only governmental actions which intrude upon personal liberties arbitrarily or in an utterly unreasonable manner violate the due process clause. See *Illinois Gamefowl Breeders Ass'n v. Block*, 75 Ill. 2d 443, 453 (1979). Nevertheless, we find that the gang loitering ordinance unreasonably infringes upon personal liberty. Persons suspected of being in criminal street gangs are deprived of the personal liberty of being able to freely walk the streets and associate with friends, regardless of whether they are actually gang members or have committed any crime. As one trial judge warned one of defendants below, "[the police] will lock you up just for being who you are." Such laws, arbitrarily aimed at persons based merely on the suspicion that they may commit some future crime, are arbitrary and likely to be enforced in a

discriminatory manner. See *Papachristou*, 405 U.S. at 166, 31 L. Ed. 2d at 118, 92 S. Ct. at 845.

The city is not helpless in its war against the criminal activity of gangs. Many of the offensive activities the city claims the gang loitering ordinance will deter are already criminal acts. See, *e.g.*, 720 ILCS 5/12-6 (West 1996) (intimidation); 720 ILCS 5/12-6.1 (West 1996) (compelling organization membership of persons); 720 ILCS 5/12-6.2 (West 1996) (aggravated intimidation—a gang member committing the offense of intimidation for the purpose of furthering gang activities); 720 ILCS 5/25-1 (West 1996) (mob action). However, the city cannot empower the police to sweep undesirable persons from the public streets through vague and arbitrary criminal ordinances.

We hold the [sic] that the gang loitering ordinance is an arbitrary restriction on personal liberty and, thus, violates substantive due process. Therefore, we need not determine whether the gang loitering ordinance impermissibly infringes on either the first amendment right of expressive association or the fundamental right of intimate association, both of which command a much higher level of scrutiny. See, *e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 623, 82 L. Ed. 2d 462, 474-75, 104 S. Ct. 3244, 3252-53 (1984).

For the foregoing reasons, the judgments of the appellate court are affirmed.

Appellate court judgments affirmed.

APPENDIX B

First Division
December 18, 1995

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

1-93-3909

THE CITY OF CHICAGO,
Plaintiff-Appellant,

v.

JAMES YOUKHANA, FERNANDO O. COTA, JOSE A. MERCED, ROOSEVELT MCMULLAN, JR., JOHNNY R. NEWSOME, ANTHONY D. CORDERO, JULIO M. BARROSO, HERMIE J. KHAMO, LAMONT J. JORDAN, LISA GONZALES, FLORENTINE SOTO, RENEE GOODWILL, TASHA WHITE and SABRINA BROWN,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County
Honorable Thaddeus L. Kowalski, Judge Presiding

JUSTICE BUCKLEY delivered the opinion of the court:

The City of Chicago (the City) prosecuted defendants for violating section 8-4-015 of the Municipal Code of Chicago, more commonly known as the "gang-loitering ordinance." (Chicago Municipal Code § 8-4-015 (1992).) Defendants moved to dismiss the City's action against

them, and on September 29, 1993, the circuit court granted the defendants' motion, finding that the ordinance violated the United States and Illinois Constitutions. The City appeals the circuit court order, and we must affirm.

We base our decision on several grounds, the strongest of which is that this ordinance violates the freedoms of association, assembly and expression secured by the first amendment and article I, section 5, of the Illinois Constitution. The ordinance also suffers from the infirmity of being unconstitutionally vague, thus violating due process rights. Furthermore, we find that the ordinance unconstitutionally criminalizes status and allows arrests without probable cause in violation of the fourth amendment.

BACKGROUND

Like many other American cities, Chicago is home to criminal street gangs. In 1992, the City held hearings on the subject of gang-related crime. Based on these hearings, the City determined that criminal street-gang activity in Chicago was largely responsible for the increasing murder rate in the City. The City also concluded that the presence of gang members in public places is intimidating to law-abiding citizens. The City recognized that gangs operate by establishing control over identifiable areas, by loitering and intimidating others from entering those areas. However, by ceasing to commit crimes, such as drug dealing and vandalism, when police officers are present, the gang members avoid arrest while maintaining control over their territory. This obvious connection between gang crime and loitering led the City to enact the ordinance at issue here. The gang-loitering ordinance provides in pertinent part:

> "(a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area.

Any person who does not promptly obey such an order is in violation of this section.

(b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.

(c) As used in this Section:

(1) 'Loiter' means to remain in any one place with no apparent purpose.

(2) 'Criminal street gang' means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

* * *

(5) 'Public place' means the public way and any other location open to the public, whether publicly or privately owned."

Chicago Municipal Code § 8-4-015 (1992).

After the ordinance was adopted, the Chicago police department promulgated a general order to define the circumstances under which members of the department are permitted to enforce the ordinance. Authorized officers are directed to order persons loitering in a designated area "to disperse and remove themselves from the area" when there is probable cause to believe that at least one of those persons is a criminal street-gang member. The officers are then directed to arrest and charge "any person who does not promptly obey such an order." The order requires the arresting officer to complete the arrest report for each arrest, which provides specific reasons for a conclusion of probable cause that the arrestee was either a

criminal street gang or a person loitering in a group with a gang member. General Order No. 92-4, at 3 (1992).

Probable cause to establish membership is substantiated by the officers' experience and knowledge of the alleged offenders and reliable information such as admission of membership, uses of gang symbols, or identification of reliable informants. (General Order No. 92-4, at 2 (1992).) The district commanders must maintain and update gang information files and ensure that they contain only names of individuals the department has concluded it has probable cause to believe are members of criminal street gangs operating within the district. The order also provides that the criminal street gangs in each area must be identified "on the basis of specific, documented and reliable information," such as officer observations, analysis of crime pattern information, and interviews with witnesses, admitted gang members and reliable informants.

According to the general order, the ordinance may be enforced only in portions of the City where loitering by street gangs has posed a demonstrable problem for the surrounding community. In deciding which areas to designate, district commanders must consult with knowledgeable members of the department and appropriate community groups. They must also use crime pattern information, citizen complaints, police observations, and the views of local public officials and other reliable members of the community.

On June 15, 1993, defendants, James Youkhana, Fernando O. Cota, Jose A. Merced, Roosevelt McMullan, Jr., Johnny R. Newsome, Anthony D. Cordero, Julio M. Barroso, Hermie J. Khamo, Lamont J. Jordan, Lisa Gonzales and Florentine Soto, were arrested at 1433 West Carmen in Chicago and charged with violating the ordinance. According to the complaints filed against them, the defendants were "observed loitering at 1433 W. Carmen, a public place with one or more persons at least

one of whom was a member of the Latin Kings criminal street gang, and *** failed to disperse and remove [themselves] from the area when ordered to do so by the [Police] [Officer] R. Day #4476." Defendants Sabrina Brown, Tasha White, and Renee Goodwill were arrested on June 22, 1993, and charged with violating the ordinance by loitering in the vicinity of 1528 West Morse in Chicago. The arrest reports indicate that they are members of the Gangster Disciple street gang. After being warned to leave the area "at 2145 hrs," they were found to be loitering in the same area and refused to leave the area at 2200 hours.[1]

Defendants moved to dismiss the complaints against them on the ground that the ordinance is unconstitutional on its face, and as applied, in that it violates their rights under the fourteenth, first, and fourth amendments of the United States Constitution and the corresponding sections of the Illinois Constitution. The municipal court granted the motion and this appeal followed.

DISCUSSION

I

The overbreadth doctrine "allows a defendant to challenge the validity of a statute on its face when the mere existence of the statute may inhibit the exercise of expressive or associational rights protected by the first amendment, even though those rights do not protect the activities of the defendant." (*People v. Garrison* (1980), 82 Ill. 2d 444, 449, 412 N.E.2d 483, 486, citing *Bates v. State Bar* (1977), 433 U.S. 350, 380, 53 L. Ed. 2d 810, 833, 97 S. Ct. 2691, 2707; *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 611-17, 37 L. Ed. 2d 830, 839-

[1] Sabrina Smith's and Tasha White's arrest reports state that they were found loitering in the same area "at 2300 hrs," but the complaints filed against the three of them all state 2200 hours as the time they were found loitering the second time.

43, 93 S. Ct. 2908, 2915-18.) A law is overbroad if it authorizes punishment of constitutionally protected conduct. *City of Houston v. Hill* (1987), 482 U.S. 451, 458, 96 L. Ed. 2d 398, 410, 107 S. Ct. 2502, 2508.

The City argues that this ordinance is not overbroad because any expressive activity protected under the first amendment such as picketing and protesting is not implicated by the ordinance, as these activities have an apparent purpose. However, we agree with defendants' contention that the ordinance clearly implicates the first amendment rights of assembly, association, and expression.

In *Coates v. City of Cincinnati* (1971)[,] 402 U.S. 611, 29 L. Ed. 2d 214, 91 S. Ct. 1686, the United States Supreme Court found Cincinnati's loitering ordinance to be unconstitutionally broad. The ordinance made it a criminal offense for "three or more persons to assemble *** on any of the sidewalks *** and there conduct themselves in a manner annoying to persons passing by ***." (*Coates*, 402 U.S. at 611 n.1, 29 L. Ed. 2d at 216 n.1, 91 S. Ct. at 1687 n.1.) The Court stated: "The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct." (*Coates*, 402 U.S. at 615, 29 L. Ed. 2d at 218, 91 S. Ct. at 1689.) The Court emphasized that an ordinance cannot make a crime out of conduct that cannot be a crime under the Constitution. *Coates*, 402 U.S. at 616, 29 L. Ed. 2d at 218, 91 S. Ct. at 1689.

The Supreme Court upheld a disorderly conduct statute, as construed by the State court, in *Colten v. Kentucky* (1972), 407 U.S. 104, 32 L. Ed. 2d 584, 92 S. Ct. 1953. The Kentucky statute made it an offense for a

person with intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof, to congregate with others in a public place and refuse to comply with a lawful police dispersal order. The Kentucky Court of Appeals construed the statute to apply only where there is no *bona fide* intention to exercise a constitutional right or where the interest to be advanced by the particular exercise of a constitutional right is insignificant in comparison with the inconvenience, annoyance or alarm caused by the exercise. The Supreme Court held that the statute as applied did not chill or stifle the exercise of any constitutional right because the State court made a finding that Colten was not exercising a constitutional right at the time of his arrest and the evidence supported that finding. *Colten*, 407 U.S. at 109, 32 L. Ed. 2d at 589, 92 S. Ct. at 1957.

The City's ordinance infringes upon first amendment freedoms in several obvious ways. We read the ordinance to mean that when one gang member stands in public with a group of innocent non-gang members, all can be ordered to disperse, and all can be arrested for failing to disperse. The ordinance is triggered when a gang member is observed loitering; the innocent persons' conduct is irrelevant. In other words, the ordinance gives the police power to order dispersal and arrest those who associate with gang members in public places. This smacks of a police-state tactic and clearly violates the first amendment rights of the innocent persons.

That is not to say that the ordinance would be saved if only gang members could be ordered to disperse and arrested, or if the non-gang members also had to be found loitering before they could be subject to the ordinance. The ordinance clearly reaches conduct that the government has no business prohibiting. It prohibits loitering, or standing in one place "with no apparent purpose." It does not require that the loitering be done with an intent to cause alarm or anything of the sort. Standing in one place with no apparent purpose cannot be

made a crime, just as assembling on the sidewalks in a manner annoying to passersby could not be made a crime in *Coates*. *Coates*, 402 U.S. at 616, 29 L. Ed. 2d at 218, 91 S. Ct. at 1689.

The circuit court expressed its concern that this ordinance may apply to situations such as a social worker talking to a gang member or two people stargazing. We believe that this ordinance reaches conduct that is just as innocent, but not as obviously so. For example, the ordinance would apply to someone waiting with a friend or family member for a ride to the grocery store, or someone waiting outside a laundromat for their cloth[e]s to dry. It would also apply to two friends who see each other on the street and stop to talk. Unlike the ordinance in *Colten*, which required intent to cause public inconvenience or alarm, this ordinance is beyond saving by judicial construction.

Finally, we find this ordinance unconstitutional on an independent State ground. Article I, section 5, of the Illinois Constitution ensures the "right to assemble in a peaceable manner." For the reasons stated above, this ordinance also offends that section.

II

Local governments may exercise their police powers in order to regulate conduct in public places that jeopardizes the welfare of the public. "The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of anti-social conduct." (*Coates v. City of Cincinnati* (1971), 402 U.S. 611, 614, 29 L. Ed. 2d 214, 217, 91 S. Ct. 1686, 1688.) However, a basic principle of due process is that "[all persons] are entitled to be informed as to what the State commands or forbids." (*Lanzetta v. New Jersey* (1939), 306 U.S. 451, 453, 83 L. Ed. 888, 890, 59 S. Ct. 618, 619; see also *Grayned v. City of Rockford* (1972), 408 U.S. 104, 108, 33 L. Ed.

2d 222, 227, 92 S. Ct. 2294, 2298-99. A criminal statute will be found void for vagueness if it fails to define the offense so that people of ordinary intelligence can understand what conduct is prohibited or if it encourages arbitrary and discriminatory enforcement. *Kolender v. Lawson* (1983), 461 U.S. 352, 357, 75 L. Ed. 2d 903, 909, 103 S. Ct. 1855, 1858; *Papachristou v. City of Jacksonville* (1972), 405 U.S. 156, 162, 31 L. Ed. 2d 110, 115, 92 S. Ct. 839, 843.

A brief overview of the United States Supreme Court rulings on similar ordinances is helpful. In *Papachristou v. City of Jacksonville,* the Supreme Court found the City of Jacksonville's vagrancy ordinance void for vagueness. That ordinance provided: "Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses." *Papachristou,* 405 U.S. at 156 n.1, 31 L. Ed. 2d at 112 n.1, 92 S. Ct. at 840 n.1.

The court found that the ordinance did not give fair notice as to what conduct was forbidden and that it made criminal "activities which by modern standards are normally innocent." (*Papachristou,* 405 U.S. at 163, 31 L. Ed. 2d at 116, 92 S. Ct. at 844.) The Court noted that the activities forbidden by the ordinance "are historically part of the amenities of life as we have known them." (*Papachristou,* 405 U.S. at 164, 31 L. Ed. 2d at 117, 92 S. Ct. at 844.) The Court also found the ordinance flawed in that it placed unfettered discretion in the hands of the Jacksonville police. (*Papachristou,* 405 U.S. at 168, 31 L. Ed. 2d at 119, 92 S. Ct. at 846.) The law permitted arbitrary and discriminatory enforcement because there were no standards to be followed by the police in their exercise of discretion. (*Papachristou,* 405 U.S. at 170, 31 L. Ed. 2d at 120, 92 S. Ct. at 847.) The Court concluded:

> "A presumption that people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or who look suspicious to the police are to become future criminals is too precarious for a rule of law. The implicit presumption in these generalized vagrancy standards—that crime is being nipped in the bud—is too extravagant to deserve extended treatment."
>
> *Papachristou,* 405 U.S. at 171, 31 L. Ed. 2d at 120, 92 S. Ct. at 848.

In *Coates v. City of Cincinnati* (1971), 402 U.S. 611, 29 L. Ed. 2d 214, 91 S. Ct. 1686, discussed above, the Court struck down as unconstitutional the Cincinnati loitering ordinance. The Court held that the ordinance was "unconstitutionally vague because it subject[ed] the exercise of the right of assembly to an unascertainable standard," that standard being whether or not a police officer is annoyed. *Coates,* 402 U.S. at 614, 29 L. Ed. 2d at 217, 91 S. Ct. at 1688.

In *Kolender v. Lawson* (1983), 461 U.S. 352, 75 L. Ed. 2d 903, 103 S. Ct. 1855, the challenged criminal statute required those "who loiter or wander on the streets to provide a 'credible and reliable' identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of *Terry v. Ohio,* 392 U.S. 1 (1968)."

(*Kolender*, 461 U.S. at 353, 75 L. Ed. 2d at 906, 103 S. Ct. at 1856.) The Court held that the statute, as it had been construed, was unconstitutionally vague. (*Kolender*, 461 U.S. at 353, 75 L. Ed. 2d at 906, 103 S. Ct. at 1856.) The statute provided no standards by which to determine whether the alleged offender had satisfied the requirement of providing a "credible and reliable" identification. The statute placed complete discretion in the hands of the police and created the " 'potential for arbitrarily suppressing First Amendment liberties.' " (*Kolender*, 461 U.S. at 358, 75 L. Ed. 2d at 910, 103 S. Ct. at 1859, quoting *Shuttlesworth v. City of Birmingham* (1965), 382 U.S. 87, 91, 15 L. Ed. 2d 176, 179, 86 S. Ct. 211, 213.) The Court also noted that the statute implicated "consideration of the constitutional right to freedom of movment." *Kolender*, 461 U.S. at 358, 75 L. Ed. 2d at 910, 103 S. Ct. at 1859.

An otherwise unconstitutionally vague provision can be saved by a strict reading from the State's judiciary. In *Shuttlesworth v. City of Birmingham* (1965), 382 U.S. 87, 15 L. Ed. 2d 176, 86 S. Ct. 211, the ordinance at issue provided:

> "It shall be unlawful for any person or any number of persons to so stand, loiter, or walk upon any street or sidewalk in the city so as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on." *Shuttleworth*, 382 U.S. at 88, 15 L. Ed. 2d at 178, 86 S. Ct. at 212.

The Court found that literally read, the second part of this ordinance provided that a person could stand on a public sidewalk in Birmingham only at the whim of a police officer. (*Shuttlesworth*, 382 U.S. at 90, 15 L. Ed. 2d at 179, 86 S. Ct. at 213.) The Court stated, "[t]he constitutional vice of so broad a provision needs no

demonstration." (*Shuttlesworth*, 382 U.S. at 90, 15 L. Ed. 2d at 179, 86 S. Ct. at 213.) However, the Alabama Court of Appeals ruled that the ordinance applied only when a person who stands, loiters, or walks on a street or sidewalk so as to obstruct free passage or refuses to obey a request by an officer to move on. (*Shuttlesworth*, 382 U.S. at 91, 15 L. Ed. 2d at 180, 86 S. Ct. at 214.) The Court accepted the State judicial construction of the ordinance and held that the ordinance was not unconstitutional when construed in such a way. *Shuttlesworth*, 382 U.S. at 91, 15 L. Ed. 2d at 180, 86 S. Ct. at 214.

Defendants claim that the Chicago gang ordinance is void for vagueness because it does not sufficiently define what conduct is prohibited. The ordinance defines loitering as remaining in one place with "no apparent purpose." The circuit court found that the ordinance gives police complete discretion in deciding whom to stop. The City argues that "to remain in any one place with no apparent purpose" has a commonsense meaning of "doing nothing" and the word "loiter" has never been held to be unconstitutionally vague. The City also contends that the ordinance resolves any ambiguities with the requirement that actual notice be given in the form of a police order to disperse.

Although it may be true that the word "loiter" is not unconstitutionally vague, the loitering ordinances which have been upheld have included some type of description or requirement *in addition* to the word "loiter" to describe the conduct prohibited. For example, in *Shuttlesworth*, the ordinance was construed to prohibit loitering so "as to obstruct free passage." (*Shuttleworth*, 382 U.S. at 91, 15 L. Ed. 2d at 179, 86 S. Ct. at 213.) In *City of Milwaukee v. Nelson* (1989), 149 Wis. 2d 434, 439 N.W.2d 562, the Wisconsin Supreme Court upheld an ordinance prohibiting loitering "in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity." (*Nelson*, 149 Wis. 2d at

438 n.1, 439 N.W.2d at 563 n.1.) The ordinance provided certain factors that the police officers could consider in determining whether alarm is warranted. See also *Bell v. State* (1982), 252 Ga. 267, 313 S.E.2d 678; *State v. Ecker* (Fla. 1975), 311 So. 2d 104.

In *City of Tacoma v. Luvene* (1992), 118 Wash. 2d 826, 827 P.2d 1374, the ordinance prohibited loitering "in a manner and under circumstances manifesting the purpose to engage in drug-related activity." (*Luvene*, 118 Wash. 2d at 836, 827 P.2d at 1379.) The Washington Supreme Court upheld the ordinance because it determined that an ordinary person would read the ordinance as prohibiting loitering in public and performing actions commonly associated with drug dealing. *Luvene*, 118 Wash. 2d at 846, 827 P.2d at 1385.

As stated above, we believe it would be impossible to save the Chicago ordinance by judicial construction. The ordinance does not qualify the term "loiter" in any way. It is simply the act of loitering by a gang member with others that triggers the ordinance. Furthermore, the fact that a police order to disperse must be disobeyed before an arrest does not save the ordinance from being unconstitutionally vague. A person cannot be punished for failing to obey a police order that is itself unconstitutional. *Wright v. Georgia* (1963), 373 U.S. 284, 291-92, 10 L. Ed. 2d 349, 355, 83 S. Ct. 1240, 1245.

We note that the Chicago police department is not a judicial agency and has no power to make a judicial determination of the meaning of an ordinance. Regardless, the department's construction and enforcement of the ordinance does not save it from being unconstitutionally vague. Although the department's general order provides standards for determining who is a gang member, the order does nothing to limit the complete discretion a police officer has in determining whether a person has "no apparent purpose" for remaining in one place. The

ordinance and general order are also completely silent as to exactly how fast and how far the persons have to disperse in order to avoid arrest.

The United States Supreme Court has determined that "the most important aspect of the vagueness doctrine 'is not actual notice, but * * * the requirement that a legislature establish minimal guidelines to govern law enforcement.' " (*Kolender*, 461 U.S. at 358, 75 L. Ed. 2d at 909, 103 S. Ct. at 1858, quoting *Smith v. Goguen* (1974), 415 U.S. 566, 574, 39 L. Ed. 2d 605, 613, 94 S. Ct. 1242, 1248.) The City has failed to establish such guidelines here. For these reasons, we find this statute void for vagueness. Not only does it violate the principles of due process, but it also has a chilling effect on the exercise of first amendment rights. *Grayned v. City of Rockford* (1972), 408 U.S. 104, 109, 33 L. Ed. 2d 222, 228, 92 S. Ct. 2294, 2299.

III

We further find that the gang-loitering ordinance unconstitutionally criminalizes a person's status. In *Robinson v. California* (1962), 370 U.S. 660, 8 L. Ed. 2d 758, 82 S. Ct. 1417, the Supreme Court struck down a California statute which made it a misdemeanor for any person to be a drug addict. The Court held that the law violated the eighth amendment's cruel and unusual punishment clause because it made the status of drug addict a criminal offense regardless of whether the defendant had ever used or possessed drugs within the State. *Robinson*, 370 U.S. at 667, 8 L. Ed. 2d at 763, 82 S. Ct. at 1420-21.

The Court later held in *Powell v. Texas* (1968), 392 U.S. 514, 20 L. Ed. 2d 1254, 88 S. Ct. 2145, that an alcoholic could be found guilty of violating a statute that punished him for appearing in public while drunk. "Criminal penalties may be inflicted only if the accused * * * has committed some *actus reus*." (*Powell*, 392 U.S.

at 533, 20 L. Ed. 2d at 1268, 88 S. Ct. at 2154-5.) Since the statute did not punish the alcoholic when he appeared in public while sober, the statute punished conduct and not status.

A loitering ordinance was found to unconstitutionally criminalize status in *Farber v. Rochford* (N.D. Ill. 1975), 407 F. Supp. 529.) The Chicago ordinance at issue in *Farber* provided "It shall be unlawful for any habitual drunkard, any person known to be a prostitute, or any person who aids or abets prostitution, or for any person previously convicted of a felony, of prostitution, or of aiding and abetting prostitution, to assemble or congregate with other persons of any of the foregoing classes in or upon the public ways or other public places in the city or to loaf or loiter in or about or frequent the premises of any place where intoxicating liquors are sold." (*Farber*, 407 F. Supp. at 530.) Besides finding the ordinance unconstitutionally vague, the court also found that the ordinance focused on the status of a person rather than a person's conduct as a determinative factor of guilt. (*Farber*, 407 F. Supp. at 533.) The court rejected the argument that the ordinance did not make it an offense to be a habitual drunkard or prostitute but rather prohibited the *act* of congregating or loitering by these persons. "There is no actus reus at all required by the ordinance, only conduct which, while occasionally an 'adjunct to illicit behavior, is of itself perfectly defensible." *Farber*, 407 F. Supp. at 533.

We see little, if any, difference between the ordinance struck in *Farber* and the ordinance at issue here. The City argues that the ordinance applies to conduct and not status because it applies equally to loiterers whether or not they are members of a criminal street gang. We have to disagree. Once the ordinance is triggered, it may apply equally to persons regardless of gang membership, but the ordinance can only be triggered when a gang member is found loitering. In other words, the Chicago ordinance

prohibits gang members from loitering because they are gang members, not because they are loitering. Non-gang members and those not associating with gang members are not prohibited from loitering. Therefore, it is not the conduct, but the status, that triggers this ordinance.

IV

We finally note that the ordinance jeopardizes the rights guaranteed under the fourth amendment. The fourth amendment permits law enforcement officials to arrest a person only when there is probable cause to believe that person has committed or is committing a crime. (*Tennessee v. Garner* (1985), 471 U.S. 1, 7, 85 L. Ed. 2d 1, 7, 105 S. Ct. 1694, 1699.) In reference to a vagrancy ordinance, the Supreme Court stated in *Papachristou*:

> "We allow our police to make arrests only on 'probable cause' * * *. Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system, even when the arrest is for past criminality. Further criminality, however, is the common justification for the presence of vagrancy statutes." *Papachristou*, 405 U.S. at 169, 31 L. Ed. 2d at 119, 92 S. Ct. at 847.

This ordinance seems to us a transparent attempt to avoid the probable cause requirement. The City cited the difficulty police officers have in finding probable cause to arrest a gang member for crimes such as drug trafficking, vandalism, or intimidation, as a reason for promulgating the ordinance. The City cannot overcome this difficulty by making it a crime to be a gang member in a public place. Gang membership itself is not a crime, and standing in a public place with no apparent purpose is not a crime. Adding these actions together does not make them any more criminal. When you add nothing to nothing, you get nothing. The fact that gang members may have a higher propensity to commit crime does not give the City the authority to allow arrests without probable cause.

We appreciate the magnitude of the gang-related criminal activity and the adverse effects it has on our communities. However, our constitutional standards, fortunately, do not slide up and down a scale according to the gravity of the crime problem we wish to combat. If it were otherwise, the fundamental ideals on which this country is based would slowly deteriorate.

Accordingly, for the foregoing reasons, the order of the circuit court of Cook County is affirmed.

Affirmed.

CAMPBELL, P.J. and WOLFSON, J., concur.

APPENDIX C

First Division
December 29, 1995

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

Nos. 1-93-4039, 1-93-4351, 1-93-4356,
1-94-1542, 1-94-3065, 1-94-4062) Cons.

CITY OF CHICAGO,
a Municipal Corp.,
Plaintiff-Appellee,

v.

JESUS MORALES, *et al.*,
Defendants-Appellants.

Appeal from the Circuit
Court of Cook County

Nos. 93MC1223795, 93MC1250371,
93MC1245666, 93MC1292604,
94MC1267906, 94MC1337706

Honorable JAMES B. LINN,
Honorable WILLIAM P. O'MALLEY,
Judges Presiding.

SUMMARY ORDER

Defendants, Gregorio Gutierrez, Sandy Garvin, Raul Jimenez, Jr., Daniel Washington, Jose Renteria and Jesus Morales, were found guilty of violating Chicago's gang-

loitering ordinance (Chicago Municipal Code § 8-4-015 (1992)), and they appeal their convictions. In *Chicago v. Youkhana* (1st Dist. December 18, 1995), No. 1-93-3909, this court found the ordinance to be in violation of the United States and Illinois Constitutions. Therefore, we reverse defendants' convictions under the ordinance.

Reversed in accordance with Supreme Court Rule 23 (c)(2).

BUCKLEY, J., with CAMPBELL, P.J. and WOLFSON, J., concurring.

APPENDIX D

First Division
December 29, 1995

IN THE
APPELLATE COURT OF ILLINIOS
FIRST JUDICIAL DISTRICT

Nos. 1-93-4125, 1-93-4126, 1-94-0220,
1-94-0876, 1-94-0877, 1-94-1541,
1-95-0191, 1-95-0246) Cons.

CITY OF CHICAGO,
a Municipal Corp.
Plaintiff-Appellant,

v.

MALCOLM RAMSEY, *et al.*,
Defendants-Appellees.

Appeal from the Circuit
Court of Cook County

Nos. 92MC1423997, 92MC1424444,
93MC1240541, 93MC1240542,
93MC1240582, 93MC1339427,
93MC1339484, 93MC1339486,
93MC1352401, 93MC1374870,
93MC1374871, 93MC1302116,
93MC1302497, 93MC1302728,
94MC1361275, 94MC1361276,
94MC1361277,

Honorable SAUL A. PERDOMO,
Honorable WENDELL P. MARBLY,
Judges Presiding.

SUMMARY ORDER

Defendants, Malcolm Ramsey, Neil Round, Christopher Lostroscio, Casey A. Mazeika, Karl T. Kelly, Jesse K. Paschke, Roy Delgado, Jr., Japheth Estrada, Jorge Lopez, Wladyslaw W. Jedrol, James J. Portway, Michael A. Mellero, Montee Radcliffe, Johnny M. Hall, Ronald J. Allison, Reginald Horton, Paris Bryant, Wesley Saffold, Eric Jones, Roshindaj Bryant, Leroy Minley, Jr., Eric Warren, Charlie Monden, Joseph Dell, Tywan Durnell Riley, Eric Miller, Jerry Cunningham, Eric Dennis, Vernon Diggs, Deandre Fitzpatrick, Darryl Hall, Cornelius Holt, Jonathan Lewis, Seth Lewis, Steve Reynolds, Claude Ross, Dushone Scott, Michael Simmons, Chester Sparks, Clarence Taylor, Michael Taylor, Stacey Wilson, Gabriel Ruiz, Maximilano Orozco, Ricardo Florez, Anibal Hernandez, Pablo Estrada, Juan Cruz, Andres Feliciano and Peter Quinones, were prosecuted for violating Chicago's gang-loitering ordinance (Chicago Municipal Code § 8-4-015 (1992)). The circuit court dismissed the City's actions against defendants, finding the ordinance unconstitutional, and the City appeals those judgments consolidated in this cause.

In *City of Chicago v. James Youkhana* (1st Dist. December 18, 1995), No. 1-93-3909, we held that the ordinance violates the United States and Illinois Constitutions. Thus, we affirm the judgment of the circuit court of Cook County.

Affirmed in accordance with Supreme Court Rule 23 (e)(2).

BUCKLEY, J., with CAMPBELL, P.J. and WOLFSON, J., concurring.

APPENDIX B

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS CRIMINAL DIVISION

Nos. 93 MC1 293363, 93 MC1 293364,
93 MC1 293365, 93 MC1 293366,
93 MC1 293367, 93 MC1 293367,
93 MC1 293370, 93 MC1 293372,
93 MC1 293373, 93 MC1 293375,
93 MC1 293369, 93 MC1 293368,
93 MC1 293728, 93 MC1 293729,
93 MC1 293730

CITY OF CHICAGO,
a municipal corporation,
Plaintiff,

vs.

JAMES YOUKHANA, FERNANDO O. COTA, JOSE A. MERCED, ROOSEVELT MCMULLAN JR., JOHNNY R. NEWSOME, ANTHONY D. CORDERO, JULIO M. BARROSO, HERMIE J. KHAMO, LAMONT J. JORDAN, LISA GONZALES, FLORENTINE SOTO, RENEE GOODWILL, TASHA WHITE, SABRINA BROWN,
Defendants.

MEMORANDUM AND ORDER

Defendants were arrested for violating City ordinance, Municipal Code of Chicago, Sec 8-4-015, titled Gang-related Congregations. This cause is before the court on defendants' motion to dismiss the complaints against them. Defendants argue that the ordinance on its face and as applied violates their constitutional rights under

the Fourteenth Amendment, First Amendment and Fourth Amendment to the United States Constitution and corresponding sections of the Illinois Constitution.

Municipal Code of Chicago, Sec 8-4-015 (Gang Congregation Ordinance) provides in relevant part:

> (a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.
>
> (b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.
>
> (c) As used in this section:
>
> (1) "Loiter" means to remain in any one place with no apparent purpose.
>
> (2) "Criminal street gang" means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.
>
> (5) "Public place" means the public way and any other location open to the public, whether publicly or privately owned.

The City questions the defendants' right to challenge this ordinance arguing that the application of the ordinance to defendants' behavior was constitutional. Defendants challenge the ordinance as unconstitutional on its face. As such, the details of the offense intended to be charged

are not relevant to a vagueness challenge. Defendants' conduct could not validate the ordinance if it is otherwise unconstitutional. *Lanzetta v New Jersey*, 306 U.S. 451, 453 (1939); *Kolender v Lawson*, 461 U.S. 352 (1983). In addition, a third party may challenge an ordinance for overbreadth when the law chills constitutionally protected conduct, even if it is constitutional as applied to the litigant. *Brockett v Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985); *ACLU v Alexandria*, 747 F. Supp. 324 (1990). Defendants have standing to challenge this ordinance because first amendment activities are implicated by the Gang Congregation Ordinance including freedom of association and freedom of movement.[1]

I

Cities have been instituting loitering and vagrancy ordinances for centuries. It is well settled that an ordinance, like the Gang Congregation Ordinance, prohibiting loitering without more is unquestionably unconstitutional. *Shuttlesworth v Birmingham*, 382 U.S. 87, 90 (1965); *Camarco v City of Orange*, 61 N.J. 463, 465 (1972) (An ordinance which simply proscribed loitering or idling without more would be unconstitutional); *State v Ecker*, 311 So.2d 104, 107 (Fla. 1975) (If the ordinance merely proscribed loitering or idling without more, it would be unconstitutional). Because the Gang Congregation Ordinance proscribes loitering without restriction, it cannot stand.

In *Shuttlesworth*, the Supreme Court explicitly found a virtually identically worded ordinance unconstitutional. The ordinance in Shuttleworth provided: "It shall be unlawful for any person or any number of persons to so

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[1] The right to walk, stroll, or wander aimlessly is a liberty within the first amendment area that is protected by the fourteenth amendment. *Papachristou v City of Jacksonville*, 405 U.S. 156, 164-5 (1972) [.] *See also, Territory of Hawaii v Anduha*, 48 F.2d 171 (9th Cir. 1931).

stand, loiter or walk upon any street or sidewalk of the city as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on." The Supreme Court stated "Literally read, the second part of this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstrations. . . [.] Instinct with its ever present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police state." The Court went on to find "Our decisions make it clear that the mere refusal to move on after a police officer's requesting that a person standing or loitering should do so is not enough to support the offense. . . There must also be a showing of the accused's blocking free passage." 382 U.S. 87, 90-91 (1965).

II

The Gang Congregation Ordinance is unconstitutionally vague. The void-for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v Lawson*, 461 U.S. 352 (1983); *Hoffman Estates v Flipside*, 455 U.S. 489 (1982); *Papachristou v City of Jacksonville*, 405 U.S. 156 (1972). The test to determine vagueness is whether the statute or ordinance is so obscure that men of ordinary intelligence must guess as to its meaning and differ as to its applicability.[2] Where

[2] No person should be required at peril of life, liberty or property to guess as to the meaning of a penal statute. *Lanzetta v New Jersey*, 306 U.S. 451 (1939). "Liberty under law extends to the full range of conduct which the individual is free to pursue." *Bolling v Sharpe*, 347 U.S. 497, 499 (1954). Liberty is unconstitutionally

a statute imposes criminal penalties, as does the Gang Congregation Ordinance, the standard of certainty is higher. *Kolender v Lawson*, 461 U.S. 352, 358 n. 8 (1983). The Gang Congregation Ordinance fails both prongs of the vagueness test. The ordinance fails to notify individuals what conduct is prohibited, and it encourages arbitrary and capricious enforcement by police.

The Gang Congregation Ordinance does not advise individuals how to conform their behavior so as not to violate the law. The ordinance does not require mens rea, nor does it requires any blocking of free passage or some threat to public safety prior to one's being arrested. Statutory specificity becomes more important when scienter is not an element of the criminal offense. *Boyce Motor Lines v United States*, 342 U.S. 337, 342 (1952). It is difficult to discern on what rational basis the public can distinguish between strolling in the sunlight in Lincoln Park and meandering in Garfield Park. The ordinance's definition of loitering includes activities ranging from the ostensibly innocent to the potentially criminal. In the complete absence of statutory criteria by which the one can be objectively distinguished from the other, the ordinance is fatally flawed.

Many similar ordinances have been struck down for vagueness. In *Farber v Rochford*, 407 F. Supp. 529 (1975), the plaintiff challenged her arrest under Municipal ordinance 192-6 which provided: "It shall be unlawful for any habitual drunkard, any person known to be a narcotic addict, any person known to be a prostitute, or any person who aids or abets prostitution, or for any person previously convicted of a felony, of prostitution, or of aiding and abetting prostitution, to assemble or congregate with other persons of any [of] the foregoing classes in or upon the public ways or other public places

restricted when one has to wonder whether or not he may pursue particular conduct. *See, Aptheker v Secretary of State*, 378 U.S. 500 (1964).

in the city or to loaf or loiter in or about or frequent the premises of any place where intoxicating liquors are sold." The court held the ordinance was unconstitutionally vague because, like the Gang Congregation Ordinance, the ordinance contained no actus reus, merely conduct which while occasionally an adjunct to illicit behavior, was of itself perfectly defensible. The statute made criminal, activities which by modern standards were normally innocent. *Id.*

In *Commonwealth v Carpenter*, 91 N.E.2d 666 (MA 1950), the loitering ordinance read "No person shall, in a street, unreasonably obstruct the free passage of foot-travelers, or willfully and unreasonably saunter or loiter for more than seven minutes after being directed by a police officer to move on." The complainant was charged under the second part of this statute with willfully loitering for more than seven minutes after being directed to move on. The court held this part of the ordinance unconstitutional on its face. "It undertakes to make criminal an intentional and unreasonable failure by one on a street to move on as soon as seven minutes have elapsed after a direction to that end given by a police officer. Prima facie, mere sauntering or loitering on a public way is lawful and the right of any man, woman, or child." *Id.*, at 667. (emphasis added) The court recognized that the fatal flaw in the ordinance was its failure to notify a reasonable individual when conditions convert his lawful conduct into that which is criminal. *Id.*

In *Territory of Hawaii v Anduha*, 48 F.2d 171 (9th Cir. 1931) the court held invalid an ordinance which provided "any person who shall habitually loaf, loiter, and/or idle upon any public street or highway or in any public place shall be guilty of a misdemeanor." *Id.* Similarly in *Scott v District Attorney*, 309 F. Supp. 833 (1970), the court held unconstitutionally vague an ordinance which provided in part "The following persons are and shall be guilty of vagrancy: . . . (8) Persons found in or near any structure, movable, vessel, or private ground without being able to account for their lawful presence.["] *Id.* Each of these ordinances was found unconstitutionally vague, in part, because like the Gang Congregation Ordinance, it failed to distinguish lawful from unlawful conduct.[3]

[3] Many courts have found similar and even more specific loitering statutes unconstitutionally vague. The following ordinances were found unconstitutionally vague because they failed to adequately notify persons of the proscribed acts and/or encourage arbitrary and discriminatory enforcement. See *Bullock v City of Dallas*, 248 Ga. 164 (1981) ("No person shall remain or loiter upon any premises to which the public has access, including but not limited to such places as business and shopping area parking lots, where the person's presence upon such premises is unrelated to the normal activity, us[e] or business for which such premises are made available to the public"); *State v Starks*, 51 Wis.2d 256 (1971) ("A person found in or loitering near any structure, vehicle or private grounds who is there without the consent of the owner and is unable to account for his presence"); *Fields v City of Omaha*, 810 F.2d 830 (8th Cir. 1987) ("It shall be unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity.") *City of Bellvue v Miller*, 85 Wash.2d 539 (1975) ("Any person who wanders or prowls in a place, at a time or in a manner, and under circumstances, which manifest an unlawful purpose or which warrant alarm for the safety of persons or property in the vicinity is hereby declared to be a vagrant, and is guilty of a misdemeanor"); *City of Portland v White*, 9 Ore. App. 239 (1972) ("No person shall loiter or prowl in a place, at a time, or in a manner not usual for law abiding persons under circumstances that warrant alarm for the safety of persons or property in the vicinity"); *State of Nevada v Father Alain Richard*, 108 Nev. 626 (1992) ("Every person who: (i) Loiters, prowls or wanders upon the private property of another, without visible or lawful business with the owner or occupant thereof . . . is a vagrant."); Scott v District Attorney, 309 F. Supp. 833 (1970) ("The following persons are and shall be guilty of vagrancy: . . . (7) Persons who loaf the streets habitually or who frequent the streets habitually at late or unusual hours of the night, or who loiter around any public place of assembly, without lawful business or reason to be present; or (8) Persons found in or near any structure, movable, vessel, or private grounds without being able to account for their lawful presence therein)[.] *See also, E.L. v Florida*, 619 So.2d 252 (Fla. 1993).

Similarly, the Gang Congregation Ordinance proscribes the mere act of loitering, despite intent or effect of the loitering. The definition in the act of loitering does not encompass any criminal intent. The gang loitering statute bears a striking resemblance to that part of the ordinance the Supreme Court in *Shuttleworth* found patently unconstitutional. There is no requirement that a person block free passage, interfere with police duty, have an intent to commit a crime, or exhibit some suspicious behavior. Merely standing in a public place is a crime. A reasonable person would have no idea what was required, short of staying in his home, in order to avoid coming into confiict with this ordinance.

The gang loitering statute defines the term "loitering" as "remaining in one place with no apparent purpose."[4] The term "apparent purpose" is extremely vague and gives police complete discretion to decide who to stop. Is there a time when a person does not have a purpose for his actions? If one is standing in front of his home with a group of friends, perhaps his purpose is just to chit chat; or maybe to wait for a ride; or maybe to cool off. If a couple is sitting on a park bench, perhaps their purpose is to star gaze, or to think, or to have a quiet conversation. How many of these "purposes" although completely harmless and lawful, are apparent to one who is observing the group? The new Webster's Dictionary defines the term "apparent" as ["]seeming, but not real; real and evident, obvious". This definition illustrates the ambiguity tied to the word "apparent". Suppose a group of gang members were playing basketball in the park, while waiting for a

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[4] The term "loiter" on its face and as interpreted has no sinister meaning and implies no wrongdoing or misconduct. It is a matter of common knowledge that the majority of mankind spends a good part of their waking hours loitering and idling the time away, and much of that time is spent in public places. *See, Ricks v District of Columbia*, 414 F.2d 1097, 1103 n.46 (D.C. Cir.); *Territory of Hawaii v Anduha*, 48 F.2d 171, 172 (9th Cir. 1931).

drug delivery. Their apparent purpose is that they are in the park to play ball. The actual purpose is that they are waiting for drugs. Under this definition of loitering, a group of people innocently sitting in a park discussing their futures would be arrested, while the 'basketball players' awaiting a drug delivery would be left alone.

There is no provision in the ordinance allowing an individual the opportunity to explain his purpose for being in a particular place, nor is it an affirmative defense that one had a legitimate purpose for being in a given place at a given time. This ordinance, like so many others found unconstitutionally vague, allows people to walk the streets only at the whim of police officers, and provides a convenient tool for harsh and discriminatory enforcement by local prosecuting officials against particular unpopular groups. *Kolender v Lawson*, 461 U.S. 352 (1983).

The City cites numerous loitering ordinances to support the validity of the gang loitering statute. However, all the loitering ordinances found in the cases cited by the City contain a requisite mental state or otherwise limiting requirement not present in the Gang Congregation Ordinance.

In *colt[e]n v. Kentucky*, 407 U.S. 104 (1971), defendant was convicted under the Kentucky disorderly conduct statute, which provided: "A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: . . . Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse." In upholding the statute the Court stated that because the police had a legitimate interest in enforcing traffic laws, and here [sic] the police had apprehension that defendant's behavior increased the risk of an accident, the enforcement of the ordinance was proper. Further, because the statute authorized conviction only for refusing to disperse with the intent of causing inconven-

ience, annoyance or alarm, the statute was not vague or overbroad. *Id.*

State courts have similarly required more be prohibited than mere loitering to uphold an ordinance as constitutional. In *Camarco v City of Orange*, 61 N.J. 463 (1972), the court upheld a loitering ordinance which proscribed "loitering which obstructs, molests or interferes with others lawfully in public places or which threatens an immediate breach of the peace". In upholding the ordinance, the court construed the ordinance to proscribe only "such loitering conduct as clearly will cause an immediate, actual physical violent reaction from any person, which violent reaction will cause a threat to the peace and order of the public, or loitering which obstructs the free passage of pedestrians or vehicles." The court explicitly recognized that an ordinance which simply proscribed loitering or idling without more would be unconstitutional. *Id.*, at 465.

In *State v Ecker*, 311 So.2d 104 (Fla. 1975), the court upheld a loitering ordinance modeled after the Model Penal Code which proscribed loitering in a place, at a time or in a manner not usual for law-abiding citizens under circumstances that warrant a justifiable and reasonable alarm or immediate concern for safety of persons or property in the vicinity. The ordinance defined certain circumstances which would give rise to alarm, and afforded persons an opportunity to dispel any alarm. A person could not be convicted under the ordinance if the police officer did not follow the procedures explicitly set out in the statute or if the court found his explanation for his presence would have dispelled fear. The court found the ordinance constitutional because it applied only in those situations where peace and order are threatened or where the safety of persons or property is jeopardized. In upholding this ordinance, the court explicitly recognized that if the statute merely proscribed loitering or idling without more, it would be unconstitutional. *Id.*

In *City of Akron v Holley*, 53 Ohio Misc.2d 4, 557 N.E.2d 861 (1989), the court upheld an ordinance providing "No person shall loiter in certain places in a manner and under circumstances manifesting a purpose to engage in prohibited drug-related activity contrary to the provisions of R.C. Chapter 2925." In order to uphold the ordinance, the court interpreted the ordinance to require that an illegal purpose be present in addition to mere loitering, and that this illegal purpose be manifested by some overt act. Id. at 865.[6]

All of the above cited cases have a very important commonality, not shared by the Gang Congregation Ordinance. In each instance, the loitering statute required more than mere loitering in order to bring one's conduct under the ordinance. The ordinances were either limited in scope, time, and manner, the peace and order were threatened, or the public safety was involved. In contrast, the gang loitering statute forbids members of the covered group from loitering in any public place regardless of intent or consequence.

The City argues that because the officer's [sic] must first order persons to disperse prior to arrest for violation of the Gang Congregation Ordinance, the ordinance gives sufficient notice as to what behavior is proscribed. This analysis is improper. One cannot be punished for failing to obey the command of a police officer if that command

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[6] See also, *Bell v State*, 252 Ga. 267 (1984) (The court upheld an identical ordinance to the one in *Ecker*. The court held the statute was not vague because it proscribed only loitering which amounted to a threat to the safety of persons or property in the vicinity); *Milwaukee v Nelson*, 149 Wis.2d 434 (1988) (Court upheld statute similar to the one in Bell because the ordinance was limited in scope, place and manner, and could not be violated by just loitering without more); *Tacome v Luvene*, 118 Wn.2d 826 (1992) (Court upheld statute that proscribed loitering in a manner and under circumstances manifesting the purpose to engage in drug related activity because as interpreted the ordinance required intent to engage in drug-related activity and an additional overt act besides loitering).

is itself violative of the Constitution. *Wright v Georgia*, 373 U.S. 284 (1963).

In *Wright v Georgia*, six black men playing basketball in the park were arrested for breach of the peace after failing to leave the park after being so ordered by the police. The court held that the ordinance under which the defendants were arrested was unconstitutionally vague. "The possibility of disorder by others cannot justify exclusion of the petitioners from the park." *Id.*, at 292. The fact that the defendant's [sic] were first provided with an order to leave the park, did not save the ordinance. *Id.* Similarly, the Gang Congregation Ordinance punishes conduct that cannot be constitutionally punished. A requirement that a police order to move on must first be disobeyed does not validate the ordinance.

The City argues that its General Order 92-4 read together with the Gang Congregation Ordinance renders the ordinance sufficiently clear to avoid a vagueness challenge. The court cannot agree. The general order goes to great lengths to define who is a criminal gang member. The General order does not provide any guidelines for limiting the enforcement of the ordinance to circumstances under which prohibited conduct accompanies loitering. Even with the General Order, officers are still left with unfettered discretion to decide who has an "apparent purpose" for being in a public place.

It is true that where a statute can be made constitutionally definite by a reasonable construction, the court is under a duty to give it that construction. *Orbach v Axelrod*, 100 Ill. App.3d 973 (1st Dist 1981)[.] However, to supply the necessary language to the Gang Congregation Ordinance would be to exceed the court's authority to reasonably construe the ordinance, and would result in judicial legislation. *Smith v Goguen*, 415 U.S. 566, 575. The court would have to add terms to the ordinance clearly not intended. "It would certainly be dangerous

if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *Smith v Goguen*, 415 U.S. at 573.

III

The Gang Congregation Ordinance has a further fatal flaw because it looks toward the status of a person rather than his conduct. It is well settled that a person cannot constitutionally be punished for one's status. *Aptheker v Secretary of State*, 378 U.S. 500 (1964). An ordinance, such as the Gang Loitering Ordinance, which transforms into criminal behavior, ordinary conduct of individuals on the basis of suspected status or membership in a particular group, is patently unconstitutional. *Farber v Rochford*, 407 F. Supp. 529 (N.D. I.L. 1975).

In *Farber v Rochford*, discussed earlier, the court also found the ordinance in question unconstitutionally vague because it focused on covered categories of people rather than conduct as the measure of guilt. The court stated, "Statistical likelihood that a particular societal segment will engage in criminality is not permissible as an all-out substitute for proof of individual guilt. And not even past violation of the criminal law authorizes one's subjection to inately vague statutory specifications of crime.["] *Id.*, at 534, *citing Ricks v District of Columbia*, 414 F.2d 1097, 1110 (D.C. Cir. 1968).

In *Aptheker v Secretary of State*, the defendants challenged the constitutionality of the Subversive Activities Control Act which provided in relevant part: "(a) when a Communist organization is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge of notice that such organization is so registered or that such order has become final (1) to make application for a passport, or the re-

newal of a passport, to be issued or renewed by or under the authority of the United States; or (2) to use or attempt to use any such passport." The Supreme Court held the statute unconstitutional. The court found a problem with applying the statute to members of a certain group. The terms of the statute applies [sic] whether or not the member actually knew or believed he was associated with alleged communist action. "Even though some members had illegal aims and engaged in illegal activities, it cannot automatically be inferred that all members shared their evil purposes or participated in their illegal conduct." 378 U.S. 500, 510-511 (1964). The statute improperly created an irrebuttable presumption that individuals who are members of a specified organization will engage in illegal activities. The statute applied regardless of the purpose one wished to travel, even for an innocent purpose such as to visit a sick relative. Id.; See also *Kent v Dulles*, 357 U.S. 116 (1958).

Similarly, the Gang Congregation Ordinance creates an irrebuttable presumption that a person believed to be a gang member, if standing in a public place, will commit illegal activities, and therefore, his mere presence in a public place is a crime. Under the Gang Congregation Ordinance, it does not matter whether the alleged gang member is aware of his status. In addition, anyone who wanders near an alleged gang member, whether or not that person is aware of the other's status, is subject to arrest under the ordinance.[6] As in [*Aptheker*], the gang loitering statute does not allow a person to account for his presence on the street, no matter how innocent. The

[6] The City argues that because non-gang members as well as gang members can be arrested under the ordinance, the ordinance is not status based. On the contrary, because non-gang members can be arrested because they come into contact with another whose status is suspect, whether or not they are aware of that status, does not convert the ordinance from being status based to neutral. It advocates guilt by mere association. This aspect further adds to the infirmity of the ordinance.

government cannot prevent crime by arresting those with a propensity to commit crime.[7]

The City misinterprets *Powell v Texas*, 392 U.S. 514 (1967)[,] to support the position that the Gang Congregation Ordinance is not status based. The ordinance in *Powell* made it a crime to be drunk in a public place. Under that ordinance, a drunk could be in public so long as he was sober. In contrast, the Gang Congregation Ordinance makes it a crime for a gang member to be in public whether or not he is [perpetrating] a crime. The distinction is clear, and further illustrates the invalidity of the Gang Congregation Ordinance as a status based ordinance.

In sum, the Gang Congregation Ordinance is unconstitutionally vague as it does not notify individuals how to conform their behavior to the law, and provides police with unfettered discretion in deciding who will be arrested. Further, the ordinance improperly focuses on the status of an individual as opposed to his actions. As such, the ordinance violates the Fourteenth Amendment to the United States Constitution, as well as article I, section 2, of the Illinois Constitution.

[7] *See, Ricks v District of Columbia*, 414 F.2d 1097, 1100 (D.C. Cir. 1968)[,] where court found unconstitutional an ordinance providing "The following classes of persons shall be deemed vagrants . . .: (1) Any person known to be a pickpocket, thief, burglar, confidence operator or felon, . . . and not giving a good account of himself when found loitering around in any park, highway, public building, or other public place, store, shop or reservation, or at any public gathering or assembly." In finding the ordinance unconstitutional, the court stated, "(T)he real objection to the vagrancy law is that its basic design is one of preventive conviction imposed upon those who because of their background and behavior are more likely than the general public to commit crimes, and that the statute contemplates such convictions even though no overt criminal act has been committed or can be proved . . . This issue . . . is inextricably intertwined with the vagueness question." *Id.* at 1109.

IV

The gang loitering statute is unconstitutionally overbroad. The First Amendment to the United States Constitution and article I, section 5 of the Illinois Constitution protect the rights of individuals to express themselves in a variety of ways. The First Amendment and article 1, section 5 protect the right of individuals to associate with whom they please and to assemble with others for political as well as for social purposes. *See, e.g., Buckley v Valeo,* 424 U.S. 1 (1976); *Griswold v Connecticut,* 381 U.S. 479 (1965)[.] An ordinance is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to conduct which the state is not permitted to regulate. A statute is also overbroad when it gives enforcement officials the power to select certain citizens, from all those exercising a particular right, and punish them. *Scott v District Attorney,* 309 F. Supp. 833, 837 (E.D. La. 1970). Criminal statutes require particular scrutiny and may be facially invalid if they make unlawful a substantial amount of constitutionally protected conduct even if they also have a legitimate application. *Houston v Hill,* 482 U.S. 451, 459 (1987).

In general, an ordinance prohibiting loitering may survive [an] overbreadth challenge if it requires the specific intent to engage in an illicit act, or the observance of some action in addition to loitering. *See Colt[e]n v Kentucky,* 407 U.S. 104 (1972); *Shuttlesworth v Birmingham,* 382 U.S. 87 (1965); *Tacoma v Luvene,* 118 Wn.2d 826 (1992). The Gang Congregation Ordinance is not so limited. The Gang Congregation Ordinance not only reaches people whose conduct may threaten the community, but also reaches all forms of protected conduct as well. Under this ordinance, two friends chatting in front of one's home may be arrested; a mother may be arrested while getting a breath of fresh air in front of her home with her children, one of whom unbeknownst to her is a gang member; friends hanging out in the park enjoying the day may be arrested; a community outreach employee

who actively seeks out gang members to assist them in breaking free of the gang may be arrested. An alleged gang member cannot sit on a park bench or step outside to cool off, without the threat of arrest. Even an alleged gang member enjoys the guaranteed rights which others enjoy to loiter before shop windows, pause to enjoy the changing color of leaves and to talk with friends, so long as they are innocent of any wrongdoing.

The point is illustrate[d] well by an example proposed during oral arguments. The City was asked what would occur under the statute if an officer observed a "known" gang member in front of a 7-eleven talking with three members of the Northwest Community Federation. The hypothetical assumed that the three members of the Northwest Community Federation were trying to talk the gang member into leaving the gang. The City responded that the officer would approach the four individuals and order them to leave. If his order was disobeyed, all four would be arrested. Clearly, the purpose behind the "loitering" in this instance was positive and lawful. No criminal intent existed, no danger to the community was imminent, and nobody's path was blocked from entering or leaving the store. Nevertheless, under the Gang Congregation Ordinance, all four of these individuals are misdemeanants by virtue of expressing themselves in a way the constitution condones. See Transcript page .

It is not disputed that the city may regulate conduct which is detrimental to the public health, safety or welfare. *City of Carbondale v Brewster,* 78 Ill.2d 111 (1979). However, the purpose of the ordinance, though legitimate and substantial, cannot be pursued by means that broadly stifle personal liberties, when the end can be more narrowly achieved. *Aptheker v Secretary of State,* 378 U.S. 500 (1964); *NAACP v Button,* 371 U.S. 415 (1963). Here the City has a legitimate purpose in addressing a growing crime problem in the streets of Chicago. As such, the City may reasonably regulate conduct in an attempt to make the streets a safer place. However,

the City cannot, as it does with the Gang Congregation Ordinance, completely eliminate basic human right[s] in order to achieve its purpose. There is a less intrusive way to achieve the purpose the City desires, and that means should be pursued.

The City is mistaken in its position that the defendants' [sic] possess no right to loiter on the streets. Defendants' [sic] have such rights just as any other citizen of the United States, so long as they conduct themselves in a peaceful, orderly manner, disturb no one, and commit no overt act. *Territory of Hawaii v Anduha*, 48 F.2d 171 (9th Cir. 1931).[8]

As such, the Gang Congregation Ordinance is overbroad under the First Amendment of the United States and article 1, section 5 of the Illinois Constitution.[9]

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[8] "Personal liberty, which is guarantied to every citizen under our constitution and laws, consists of the right of locomotion—to go whe:e one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens. One may travel along the public highways or in public places; and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the rights of no other citizens, there they will be protected under the law, not only in their persons, but in their safe conduct. The constitution and the laws are framed for the public good, and the protection of all citizens, from the highest to the lowest; and no one may be restrained of his liberty, unless he has transgressed some law. Any law which would place the keeping and safe conduct of another in the hands of even [sic] conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the right which our constitution guaranties. These are rights which existed long before our constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land.["] *Territory of Hawaii v Anduha*, 48 F.2d 171, 171-172 (9th Cir. 1931), *citing Pinkerton v Verberg*, 78 Mich. 573, 44 N.W. 579, 582.

[9] Defendants challenge the constitutionality of the Gang Congregation Ordinance on additional grounds including under the Fourth Amendment to the United States Constitution. Because the Court finds the ordinance unconstitutional on independent grounds the Court does not reach this issue. However, the Court does recognize

V

In light of the above, this Honorable Court finds:

1. The Gang-related Congregation[] Ordinance, City of Chicago Ordinance #8-4-015 (1992) (Gang Congregation Ordinance), violates the Fourteenth Amendment of the United States and article I, section 2 of the Illinois Constitution because its terms even as limited by General Order 92-4 of the City of Chicago Police Department, are so vague as to violate due process of law.

a. That the Gang Congregation Ordinance fails to grant sufficient notice to potential offenders of what conduct may lead to an arrest, and encourages arbitrary and discriminatory enforcement by law enforcement officials.

b. That the Gang Congregation Ordinance improperly bases arrest on an individual[']s status instead of conduct.

2. That the Gang Congregation Ordinance is overbroad on its face under the First Amendment to the United States Constitution and article 1, section 5 of the Illinois Constitution.

Accordingly, IT IS HEREBY ORDERED that the defendants' motion to dismiss is granted.

ENTERED BY:

_____

JUDGE THADDEUS L. KOWALSKI,
Associate Judge of the
Circuit Court of
Cook County, Illinois

DATED: _____

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the position of the court in *Farber v Rochford*, 407 F. Supp. 529 (N.D. I.L. 1975), *citing U.S. ex rel. Newsome v Malcolm*, 492 F.2d 1166 (2d Cir.) 1974[,] that "Because the crime prevention components of loitering statutes are aimed at suspected or potential rather than incipient or observable conduct, they may conflict with the deeply rooted Fourth Amendment requirement that arrests must be predicated on probable cause.["] *Id.* at 1172.

APPENDIX F

ORDINANCE AND REGULATION INVOLVED

Municipal Code of Chicago

Substitute Ordinance

WHEREAS, The City of Chicago, like other cities across the nation, has been experiencing an increasing murder rate as well as an increase in violent and drug related crimes; and

WHEREAS, The City Council has determined that the continuing increase in criminal street gang activity in the City is largely responsible for this unacceptable situation; and

WHEREAS, In many neighborhoods throughout the City, the burgeoning presence of street gang members in public places has intimidated many law abiding citizens; and

WHEREAS, One of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas; and

WHEREAS, Members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present, while maintaining control over identifiable areas by continued loitering; and

WHEREAS, The City Council has determined that loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity; and

WHEREAS, The City also has an interest in discouraging all persons from loitering in public places with criminal gang members; and

WHEREAS, Aggressive action is necessary to preserve the City's streets and other public places so that the public may use such places without fear; and

WHEREAS, The City Council has also determined that it is necessary to amend the Municipal Code of Chicago to provide for a stronger curfew ordinance and a more effective means of enforcement; now therefore;

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHICAGO:

SECTION 1. Chapter 8-4 of the Municipal Code of Chicago is hereby amended by adding a new Section 8-4-015 as follows:

8-4-015. (a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

(b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.

(c) As used in this Section:

(1) "Loiter" means to remain in any one place with no apparent purpose.

(2) "Criminal street gang" means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and

whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

(3) "Criminal gang activity" means the commission, attempted commission, or solicitation of the following offenses, provided that the offenses are committed by two or more persons, or by an individual at the direction of, or in association with, any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members:

The following Sections of the Criminal Code of 1961: 9-1 (murder), 9-3.3 (drug induced homicide), 10-1 (kidnapping), 10-4 (forcible detention), subsection (a)(13) of Section 12-2 (aggravated assault—discharging firearm), 12-4 (aggravated battery), 12-4.1 (heinous battery), 12-4.2 (aggravated battery with a firearm), 12-4.3 (aggravated battery of a child), 12-4.6 (aggravated battery of a senior citizen), 12-6 (intimidation), 12-6.1 (compelling organization membership of persons), 12-11 (home invasion), 12-14 (aggravated criminal sexual assault), 18-1 (robbery), 18-2 (armed robbery), 19-1 (burglary), 19-3 (residential burglary), 19-5 (criminal fortification of a residence or building), 20-1 (arson), 20-1.1 (aggravated arson), 20-2 (possession of explosives or explosive or incendiary devices), subsection (a)(6), (a)(7), (a)(9) or (a)(12) of Section 24-1 (unlawful use of weapons), 24-1.1 (unlawful use or possession of weapons by felons or persons in the custody of the Department of Corrections facilities), 24-1.2 (aggravated discharge of a firearm), Subsection (d) of Section 25-1 (mob action-violence), 33-1 (bribery), 33A-2 (armed violence); Sections 5, 5.1, 7 or 9 of the Cannabis Control Act where the offense is a felony (manufacture or delivery of cannabis, cannabis trafficking, calculated criminal cannabis conspiracy and related offenses[)]; or Sections 401, 401.1, 405, 406.1, 407 or 407.1 of the Illinois Controlled Substances Act (illegal manufacture or delivery of a controlled substance, controlled substance trafficking, calculated criminal drug conspiracy and related offenses).

(4) "Pattern of criminal gang activity" means two or more acts of criminal gang activity of which at least two such acts were committed within five years of each other and at least one such act occurred after the effective date of this Section.

(5) "Public place" means the public way and any other location open to the public, whether publicly or privately owned.

(e) Any person who violates this Section is subject to a fine of not less than $100 and not more than $500 for each offense, or imprisonment for not more than six months, or both.

In addition to or instead of the above penalties, any person who violates this section may be required to perform up to 120 hours of community service pursuant to section 1-4-120 of this Code.

APPENDIX G

GENERAL ORDER

Date of Issue 7 August 1992

Effective date 8 August 1992

No. 92-4

Subject

ANTI-GANG LOITERING ORDINANCE

Distribution B

Related Directives

General Order: Processing Persons Under Department Control. Department Special Order: Processing of Juveniles. Department Notice: Ordinances, Enacted and Amended.

I. PURPOSE

This order:

A. states Department policy and provides guidelines relative to enforcement of Section 8-4-015 of the Municipal Code of Chicago to inhibit activities of criminal street gangs.

B. delineates responsibilities of Department members assigned to:

1. maintain information on criminal street gang activities and membership.

2. investigate street gang activities which may constitute violations of this ordinance.

II. POLICY

The presence of criminal street gang members in certain public and private places creates fear for the safety of persons and property in the area because of the violence, drug trafficking and vandalism associated with criminal street gang activities. In order to maintain public order, Department members will enforce all applicable statutes and ordinances in a fair and impartial manner, recognizing both the statutory and judicial limitations on police authority and the constitutional rights of all citizens. In order to ensure that the anti-gang loitering ordinance is not enforced in an arbitrary or discriminatory way, this directive establishes limitations on the enforcement discretion of Department members, and thereby provides for enforcement of the ordinance in a fair and principled way.

III. GENERAL INFORMATION

A. A Gang Information File will be maintained within each area unit of the Gang Crime Section and each police district for the purpose of identifying those gangs and gang members that constitute "criminal street gangs" as defined in the ordinance.

B. The Gang Arrest Information formset (CFD-45.105) will be used only to record information on persons arrested who are criminal street gang members.

C. Only sworn members of the Gang Crime Section, district tactical units and other personnel designated by an exempt member of the Department may arrest members of criminal street gangs who violate the provisions of Section 8-4-015 of the MCC.

IV. CRITERIA FOR DEFINING STREET GANGS

Criminal street gangs operating within each district must be identified. Only associations of persons meeting the definition of criminal street gangs found in Section 8-4-015 of the MCC will be designated as criminal street gangs. A criminal street gang means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of criminal gang activity, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity. Criminal gang activity means the commission, attempted commission, or solicitation, in association with or with intent to promote criminal conduct by gang members, of two or more acts, at least one of which occurred after August 6, 1992, of the following offenses: murder, drug induced homicide, kidnapping, forcible detention, aggravated assault—discharging firearm, aggravated battery, heinous battery, aggravated battery with firearm, aggravated battery of a child, aggravated battery of a senior citizen, intimidation, compelling organization membership of persons, home invasion, aggravated criminal sexual assault, robbery, armed robbery, burglary, residential burglary, criminal fortification of a residence or building, arson, aggravated arson, possession of explosives or incendiary devices, unlawful use of weapons, unlawful use or possession of weapons by felons or persons in the custody of the Department of Corrections, aggravated discharge of a firearm, mob action—violence, bribery, armed violence, manufacture or delivery of cannabis, cannabis trafficking, calculated criminal cannabis conspiracy and related offenses, illegal manufacture

or delivery of a controlled substance, controlled substance trafficking, calculated criminal drug conspiracy and related offenses. Criminal street gangs will be identified on the basis of specific, documented and reliable information such as:

A. analysis of crime pattern information.

B. observations of Department members.

C. witness interviews.

D. interviews of admitted criminal street gang members.

E. information received from informants who have proven to be reliable.

V. CRITERIA FOR ESTABLISHING MEMBERSHIP IN A CRIMINAL STREET GANG

Probable cause to establish membership in a criminal street gang must be substantiated by the arresting officer's experience and knowledge of the alleged offenders and corroborated by specific, documented and reliable information, such as:

A. the individual's admission of membership.

B. the wearing of distinctive emblems, tattoos, or similar markings indicative of a specific criminal street gang, but only when such emblems, tattoos, or similar markings would not reasonably be expected to be displayed by any individual except a member of that specific criminal street gang, and membership may not be established solely because an individual is wearing clothing available for sale to the general public.

C. the use of signals or symbols distinctive of a specific criminal street gang.

D. the identification of the individual as a member of a specific criminal street gang by an individual who:

1. has provided reliable information to the Department in the past or whose information can be independently corroborated; and

2. alleges that the individual in question is a member of a specific criminal street gang.

VI. RESPONSIBILITIES

A. District commanders will:

1. after consulting with members of the Gang Crime Section, district tactical officers, and other personnel with knowledge of gang activities within the district, and consulting, as appropriate, local officials, leaders of local community organizations, and other citizens likely to be able to provide reliable information, designate areas in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community. Only areas frequented by members of criminal street gangs which, because of their location, significantly affect the activities of law-abiding persons in the surrounding community shall be designated. Examples of areas appropriate for designation include locations near schools used for criminal street gang recruiting, locations near businesses where criminal street gang activity adversely affects the patronage of those businesses, and locations at which the presence of criminal street gang members is likely to significantly and adversely affect the value of nearby property. Section 8-4-015 of the MCC will be enforced only within the designated areas.

2. utilize the following types of information in designating areas for enforcement;

a. crime pattern information;

b. citizen complaints;

c. police observations concerning the criminal activities of criminal street gangs;

d. the views of local officials, leaders of local community organizations, and other persons within the community likely to be able to provide reliable information regarding the activities of criminal street gangs.

3. coordinate enforcement efforts in cases wherein designated areas border or overlap district boundaries.

4. disseminate information regarding the specific areas within the district in which Section 8-4-015 of the MCC will be enforced to the Gang Crime Section.

5. ensure that separate Gang Information Files are maintained for juvenile and adult gang members, and contain only the names of individuals the Department has concluded that it has probable cause to believe are members of criminal street gangs operating within the district.

6. meet with the appropriate area deputy chief on a semi-annual basis to review the District Gang Information Files to ensure that:

a. information on individuals who are no longer members of criminal street gangs operating within the district is deleted from the file. Death of a member, relocation of the gang or the individual from the district, or evidence that the person has quit the gang, e.g., no arrests for a period of time, are examples of information that may indicate that the individual is no longer an active gang member.

b. the hard copies of the Gang Arrest Information formset which are removed from the Gang Information File are retained in accordance with current record retention requirements.

7. ensure that command and supervisory members instruct police officers on patrol to provide special attention to the designated enforcement areas within their patrol responsibility and ensure that members of the district tactical units are apprised of the actions of criminal street gang members loitering in these areas.

B. The Commander of the Gang Crime Section will:

1. ensure that the separate unit Gang Information Files are maintained for juvenile and adult gang members and contain only the names of individuals the Department has concluded that it has probable cause to believe are members of criminal street gangs operating within the City.

2. meet with the Chief of the Special Functions Division on a semi-annual basis to review the Gang Information Files maintained in each unit to ensure that:

a. information on individuals who are no longer members of criminal street gangs operating within the City is deleted from the file. Death of a member, relocation of an individual from the City, or evidence that the person has quit the gang, e.g., no arrests for a period of time, are examples of information that may indicate that the individual is no longer an active member.

b. the carbon copies of the Gang Arrest Information formset which are removed from the unit Gang Information Files are retained in accordance with current record retention requirements.

3. disseminate information regarding the specific areas within each district in which Section 8-4-015 will be enforced to members of the Gang Crime Section assigned to these areas.

C. Sworn members authorized to enforce the anti-gang loitering ordinance under Item III-C will:

1. familiarize themselves with information maintained by the Department concerning the members of criminal street gangs in the areas in which these members operate.

2. to the extent possible, pay attention to the designated areas within each district during the course of routine patrol activities or investigations.

3. when there is probable cause to believe that two or more persons whose names ap-

pear in a Gang Information File and those persons are active members of that criminal street gang; or

when there is probable cause to believe that criminal street gang members are loitering in a designated area

a. order such persons and any other persons loitering in the same place with such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order will be arrested and charged with a violation of Section 8-4-015 of the MCC.

b. ensure that arrestees are transported to a Department facility for processing in accordance with current Department directives.

c. complete the unshaded portion of an Arrest Report (CFD-11.420) for each adult arrested, or a Juvenile Field Arrest Report (CFD-11.421) for each juvenile arrested. The narrative section of each arrest report must adequately support the arrest by relating all essential facts and by fully describing the circumstances giving rise to probable cause to arrest. The narrative must contain articulable, specific reasons which indicate that the arrestee is in fact subject to arrest under section 8-4-015 of the MCC and include the articulable, specific reasons why the member concluded that he had probable cause to believe that the arrestee was a member of a criminal

street gang or was loitering in a group with a member of a criminal street gang.

D. The watch commander in charge of a detention facility will ensure that arrestees are processed in accordance with current Department procedures.

E. Any sworn member, who arrests a person for any criminal or quasi-criminal offense whose membership in a criminal street gang can be substantiated, will complete a Gang Arrest Information formset and submit it to his supervisor for review and signature. The hard copy of the Gang Arrest Information report formset will be forwarded to or retained in the district of occurrence; the carbon copy will be forwarded to or retained by the appropriate area unit of the Gang Crime Section.

VII. ACCESS TO FILES CONTAINING INFORMATION ON MEMBERS OF CRIMINAL STREET GANGS

District commanders and the Commander of the Gang Crime Section will ensure that access to gang information files maintained within their units is consistent with current statutes. Access will be limited to:

1. Department sworn members and representatives of other law enforcement agencies who are engaged in the investigation and suppression of criminal street gang activities.

2. any other person granted authority by statute, subpoena or court order.

/s/ Matt L. Rodriguez
Superintendent of Police

Supreme Court, U.S.
FILED
MAR 9 1998
OFFICE OF THE CLERK

(2)

No. 97-1121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF CHICAGO,

Petitioner,

v.

JESUS MORALES, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF IN OPPOSITION OF RESPONDENTS YOUKHANA AND COTA

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51 pp

QUESTIONS PRESENTED

1. Whether a loitering ordinance is unconstitutionally vague when it prohibits two or more persons remaining in a public place whenever a police officer reasonably believes that one of the persons is a gang member who has "no apparent purpose."

2. Whether a loitering ordinance that prohibits two or more persons remaining in a public place whenever a police officer reasonably believes that one of them is a gang member who has no apparent purpose, (i) arbitrarily denies personal liberties of freedom of movement and association in violation of substantive due process; (ii) is substantially overbroad in violation of the First Amendment; (iii) impermissibly punishes status rather than conduct in violation of due process; and (iv) permits arrest without probable cause to believe that a crime has been or will be committed in violation of the Fourth Amendment.

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No. 97-1121

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

City of Chicago,

Petitioner,

v.

Jesus Morales, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF IN OPPOSITION OF RESPONDENTS YOUKHANA AND COTA

Respondents James Youkana and Fernando Cota respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Illinois Supreme Court opinion in this case. That opinion is not yet reported, but will be reported at 177 Ill. 2d 440, 687 N.E. 2d 53 (1997).

CONSITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

The First Amendment provides, in pertinent part that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to peaceably assemble. . . ." U.S. Const. amend. I. The Due Process Clause of the Fourteenth Amendment provides, in pertinent part, "nor shall any State deprive any person of life, liberty or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1. The Chicago gang loitering ordinance is set out in the appendix to the City's petition. Pet. App. at 60a-63a.

STATEMENT

The challenged ordinance in this case, which was adopted by the Chicago City Council in June, 1992, makes it a crime for two or more persons to remain in a public place if police reasonably believe that at least one person in the group is a gang member who has "no apparent purpose."

Prior to adopting the ordinance, a Council committee conducted hearings about conduct by street gangs that created problems in City neighborhoods. Chicago Police Deputy Superintendent Gerald Cooper, testified on behalf of the City. Among other things, he specifically addressed the question of whether existing laws were adequate to deal with the street gang problems that had been described in the hearings:

> ALDERMAN MOORE: Now, Alderman Steele has been asserting throughout the hearings that there are laws already existing on the books that address the problems that people have been testifying about today and Friday.
>
> Is that your assessment? Are there already laws and it's just a question of enforcement?
>
> MR. COOPER: I think there are already laws. I think there are already enough laws on the books at this point, criminal laws, criminal penalties which

> are much different than the ones that are articulated in the ordinance.
>
> But certainly, there is always going to be situations where there is no specific violation for or statute for, but for the most part and in the examples that people have been giving, but for the most part, I would think that 90 percent of those instances are actually criminal offenses where people, in fact, can be arrested.

Supp. R. II at 181-182.[1]

Respondents Youkhana and Cota were arrested and charged under the ordinance by complaint on June 15, 1993. Their motions to dismiss were granted on September 29, 1993. An Illinois trial court struck the ordinance down as unconstitutional. It ruled the law was vague, overbroad, and based criminal arrests on an individual's status. Appendix to Petition at 41a-59a (hereinafter, "Pet. App. ___"). The intermediate appellate court affirmed on these bases, and on the additional basis that the ordinance violated rights guaranteed under the Fourth Amendment. *Id.* at 20a-36a.

The Illinois Supreme Court again affirmed. It ruled the ordinance unconstitutionally vague. In particular, it held that the phrase "no apparent purpose" gives neither potential arrestees nor enforcing police officers guidance as to when a person's purpose for being in public is apparent. As a result, according to the Court, the ordinance leaves potential arrestees without guidance for conforming their behavior to the ordinance, and it vests in police officers absolute discretion in determining whom to arrest for violating the ordinance. The Court also concluded that neither the ordinance's requirement of gang membership nor its move on order cures its vagueness. As had the appellate court, the Illinois Supreme Court determined that the ordinance was not susceptible to a limiting construction because the City Council had intentionally drafted the ordinance as "exceptionally broad" to achieve its purposes. Pet. App.

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[1] The hearing transcripts were made a supplemental record in the state court proceeding and are cited here, as they are by the City, as "Supp. R."

at 16a.

The Illinois Supreme Court also held that the ordinance violates substantive due process. It observed that, among the personal liberties protected by the Due Process Clause are, *inter alia*, the right to freedom of movement and the right to associate with others. The Court found that the ordinance was an "arbitrary restriction" on these personal liberties. Pet. App. at 19a.

Finally, the Illinois Supreme Court observed, as had the trial and intermediate appellate courts, that the City is not helpless in its war against the criminal activity of gangs. It found that many of the activities that the City sought to deter through the ordinance already were prohibited by existing criminal laws. *Id.*

REASONS FOR DENYING THE WRIT

This Court should deny the City's petition because the question of whether a law that prohibits the conduct of mere loitering is unconstitutionally vague is one that this Court resolved many decades ago and about which there is no controversy. *Kolender v. Lawson*, 461 U.S. 352 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965). The Illinois Supreme Court correctly held Chicago's loitering ordinance vague on the basis of these precedents.

Nor is there any substantial or meaningful disagreement among lower courts over this Court's loitering jurisprudence. These lower courts have struck down mere loitering laws, like Chicago's, in the few post-*Papachristou* cases that have arisen. And, as reflected in the Illinois Supreme Court decision, the lower courts also have developed the contours for constitutional loitering laws, requiring that such laws contain some overt act or criminal intent in addition to loitering to form the prohibited conduct. Pet. App. at 11a. When these lower court decisions are examined, it is apparent that there is no meaningful controversy among them that is raised by Chicago's ordinance and the decision below.

The Illinois Supreme Court's holding on substantive due process also is unremarkable. Recognizing the unlimited scope, lack of intent and broad prophylactic objective of the ordinance, the Court properly concluded that the law arbitrarily impedes the personal liberties of free movement and association because it renders persons unable to walk the streets or associate with others "regardless of whether they are actually gang members or have committed any crime." Pet. App. at 18a-19a. Contrary to the City's representation, Pet. at 18, the Court never found a "fundamental" right to loiter and, in fact, held that the ordinance did not survive the minimal level of scrutiny advocated by the City. Pet App. at 19a.

Finally, the Court should not review the decision below because there are other substantial grounds that make Chicago's ordinance unconstitutional. While not reached by the Illinois Supreme Court, the state appellate court and trial court properly held that the ordinance is overbroad, that it punishes status rather than conduct, and that it allows arrest without probable cause.

1. Chicago's loitering ordinance is unconstitutionally vague.

The void for vagueness doctrine requires that a penal statute define a criminal offense (a) with sufficient definiteness that people of ordinary intelligence can understand what conduct is prohibited, and (b) in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). The Illinois Supreme Court correctly held that the City's ordinance is unconstitutionally vague under each of these requirements. Pet. App. 14a, 15a.

Chicago's loitering law commands a police officer to order any group of two or more persons to disperse and remove themselves from the area if he reasonably believes one of the persons to be a street gang member who is loitering in a public place. Chicago Municipal Code § 8-4-015. Pet. App. at 61a-63a. The police officer may arrest anyone who does not "promptly obey" the order. Violations of the ordinance may result in a fine of as much as $500, imprisonment for as long as six months, and the requirement to per-

form as many as 120 hours of community service. *Id.*[2]

The central element of the offense, loitering, is defined as "to remain in any one place with no apparent purpose." Pet. App. at 61a. Though the ordinance contains many fatal defects, the inherent vagueness of its prohibition on mere loitering[3] alone renders it unconstitutional.

The ordinance fails to give adequate notice of what conduct is prohibited. In *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939), this Court enunciated the basic principles underlying the requirement of adequate notice: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

Chicago's loitering ordinance fails to meet the requirement of adequate notice because people must "speculate as to [its] meaning." *Lanzetta*, 306 U.S. at 453. A loitering law that simply prohibits remaining in a place "without an apparent purpose" is so amorphous that people of ordinary intelligence cannot understand what it prohibits or how to comply with its requirement. In brief, they do not and cannot know what they must do to demonstrate to an observing police officer that they are being purposeful while in public. Thus, the City's ordinance is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates*, 402 U.S. at 614 (1971) (striking down as vague an ordinance that made it "unlawful for three or more persons to assemble on any of the sidewalks, and there conduct themselves in a manner annoying to persons passing by").

This absence of any standard of conduct was well stated by the Illinois Supreme Court in its cogent explanation of the difficulty in making one's purpose for being in public places "apparent":

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[2] Penalties in the consolidated cases ranged from 1 to 27 days of incarceration. Morales, R.23, 24; Guitierrez, R.32, 37.

[3] The Illinois Supreme Court described mere loitering laws like the Chicago ordinance as ". . . broadly worded criminal loitering laws which prohibit loitering without additional unlawful conduct . . . ." Pet. App. at 8a.

> People with entirely legitimate and lawful purposes will not always be able to make their purposes apparent to an observing police officer. For example, a person waiting to hail a taxi, resting on a corner during a job, or stepping into a doorway to evade a rain shower has a perfectly legitimate purpose in all these scenarios; however, that purpose will rarely be apparent to an observer.

Pet. App. at 10a.

Moreover, while it is nearly impossible for persons to know how to make their purposes for being in a public place "apparent," the City's rigid enforcement policy gives potential arrestees no opportunity to avoid the inevitable effects of this vagueness. Persons who wish to inform an officer that they are waiting for a taxi (which may take some time on the south side of Chicago), or for a friend or family member to arrive, will confront the harsh reality that, in the City's words, "it is immaterial [to enforcement of the ordinance] whether an individual may be able to explain his presence in a public place to the satisfaction of a police officer." City Ill. Sup. Ct. Br. at 52.

This Court first recognized the inherent vagueness of a prohibition on mere loitering, like that contained in the Chicago ordinance, in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965). The ordinance forbade "any person to stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on." *Id.* at 90. "The constitutional vice of so broad a provision needs no demonstration," this Court wrote and it condemned the ordinance, as written, because it "does not provide for government by clearly defined laws . . . ." *Id.* (quotation omitted). The Illinois Supreme Court relied upon *Shuttlesworth* in holding Chicago's law vague, noting that the proscriptions of the *Shuttlesworth* ordinance are "essentially the same" as the Chicago law. Pet. App. at 13a.

Though Chicago's ordinance does define "loiter" as "to remain in

any one place with no apparent purpose," that definition simply mirrors the dictionary meaning of loitering,[4] and provides no additional clarity to the loitering prohibition. This point is exemplified in *Papachristou*, which was this Court's next encounter with a vague law seeking to criminalize, *inter alia*, various acts of loitering. In *Papachristou*, the Court struck down an ordinance under which several of the defendants had been charged with loitering and which criminalized, much like Chicago's ordinance, the act of strolling from place to place "without any lawful purpose or object." 405 U.S. at 164. The Court held that this quoted language not only failed to provide sufficient notice, but to the contrary may simply be a "trap for innocent acts." *Id.* The Court explained further that "[t]he Jacksonville ordinance makes criminal activities which by modern standards are normally innocent." 405 U.S. at 163.[5]

As in *Shuttlesworth* and *Papachristou*, the broad proscriptions of the Chicago ordinance make it impossible for persons to know whether they are complying with the law while engaging in their general everyday activities. For example, staff of the City's Corporation Counsel testified in City Council hearings that the scope of the law

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[4] *See, e.g.*, Random House Dictionary of the English Language 843 (1971) (defining "loiter" as "[t]o linger aimlessly or as if aimlessly in or about a place"). *See also People v. Bright*, 520 N.E. 2d 1355, 1359 (N.Y. 1988) ("[t]he term 'loiter' or 'loitering' has a commonly accepted meaning that has evolved over the years, and connotes the act of remaining about or hanging around a place without any apparent purpose.")

[5] The City argues that criminalizing what may commonly be innocent acts is within its power and that injecting what types of conduct should be deemed innocent and inoffensive into the vagueness doctrine is misplaced. Pet. at 17. The City is correct if it means simply to suggest that whether innocent acts can be made criminal in a sufficiently precise ordinance is a substantive due process question and not a matter of vagueness analysis. However, neither this Court in *Papachristou* nor the Illinois Supreme Court here acted to the contrary. Both courts properly observed in their vagueness analysis that where a law employs vague language and its scope includes a broad range of everyday human activity, it becomes impossible for people to go about their everyday "innocent" endeavors and know whether they are violating the law. The Illinois Court never said that some species of "loitering" could not be made criminal. To the contrary, it only said that Chicago had failed on vagueness grounds in trying to do so.

could include prosecuting a gang member's family for loitering even when "they are outside their apartment building getting some fresh air." Supp. R. II at 231. Thus, a family escaping the heat of their apartment on a hot August evening is not sufficiently purposeful, in the City's estimation, if they are in the company of their son who is reasonably suspected of gang membership.

In addition the City presented examples in the courts below of the proper enforcement of the ordinance that encompass not only "innocent acts," but also conduct protected by the First Amendment. As noted in the trial court opinion, the City admitted that the ordinance would require the arrest of three members of the Northwest Community Federation who were talking to a gang member in front of a 7-Eleven store in an effort to persuade the gang member to leave the gang. Pet. App. at 57a. Similarly, in the Illinois Supreme Court, the City stated that if a gang member is loitering in public, the ordinance applies to him and his associates even if they are debating the constitutionality of the ordinance itself. City Ill. Sup. Ct. Br. at 43. ("The ordinance applies equally to gang members and their contacts whether a member of the Latin Kings is planning the next drive-by shooting with his co-conspirator or is debating the constitutionality of the ordinance itself.")

These examples show that the Illinois Supreme Court appropriately condemned this vague ordinance that included "normally innocent acts" within its scope. They also demonstrate that the ordinance is so inherently vague that the City itself does not know what it means or how to enforce it. Indeed, its own examples of appropriate enforcement of the ordinance are internally inconsistent. Though the City has argued that protected expressive conduct will have an apparent purpose and falls outside the scope of the ordinance, Pet. at 22 n.19, in both of the instances above, the persons are engaging in such conduct and yet the City has said it would arrest them for loitering.

Finally, it is not only suspected gang members who will be caught in the snares of the ordinance. Persons in the company of gang members, including family members, and even persons who do not know of the gang members' status, are subject to arrest and prosecution under the ordinance. This extension of the scope of the law to wholly innocent and unknowing companions of suspected gang members

also was condemned by the Illinois Supreme Court. Pet. App. at 10a.[6]

Not surprisingly, many courts have invalidated loitering laws containing prohibitions very similar to the "no apparent purpose" language of Chicago's ordinance. *See Timmons v. City of Montgomery, Ala.*, 658 F. Supp. 1086, 1089 (M.D.Ala. 1987) (invalidating ordinance that prohibited loitering "without apparent reason or business"); *Kirkwood v. Loeb*, 323 F. Supp. 611, 616 (W.D. Tenn. 1971) (invalidating that portion of a loitering statute that prohibited loitering "without legitimate business or purpose"); *People in Interest of C.M.*, 630 P.2d 593, 596-97 (Colo. 1981) (invalidating a statute that prohibited loitering in or about school grounds without a "specific, legitimate reason"); *State v. Richard*, 836 P.2d 622, 624 (Nev. 1992) (invalidating a statute that prohibited loitering on private property when loiterer has no "visible or lawful business").

The Illinois Supreme Court's decision was, therefore, a correct and entirely predictable ruling in light of the inherent vagueness of Chicago's ordinance and the substantial body of precedent — including the decisions of this Court in *Papachristou*, *Shuttlesworth* and *Coates* — holding that a mere loitering ordinance provides inadequate notice of what conduct it would prohibit.

Though the "no apparent purpose" language of the ordinance was explicitly condemned by the Illinois Supreme Court, Pet. App. at 9a-10a (as well as by the intermediate appellate court, Pet. App. at 31a-33a, and by the trial court, Pet. App. at 48a-49a), the City has chosen not to address this glaring defect in its petition. Instead it argues that persons actually do receive constitutionally adequate notice of

[6] The actual experience of two of the respondents in the consolidated cases make clear how far the ordinance reaches. Respondent Gregorio Gutierrez spent nearly a month in the Cook County Jail because his purpose in standing on a sidewalk with his brother to eat sandwiches from a local take-out joint was not sufficiently apparent to either the arresting officer or to the trial court. Gutierrez, R. 8-30. And respondent Jesus Morales was observed to be "[t]alking to citizens on the street," but neither the arresting officer nor the trial court deemed that purpose to be sufficiently apparent to escape an arrest and conviction under the ordinance. Morales, R. 6-21.

what conduct is prohibited because persons cannot be arrested until they refuse to obey a police officer's order to move on. Pet. at 11-12.

However, the requirement of a move on order does not mitigate the failure adequately to define the central element of the offense. It simply puts innocent persons in the position of having "to disperse and remove themselves from the area" or face arrest and prosecution without having the faintest idea of what they did wrong. Even more important, persons still will not know what they must do in the future to avoid being prosecuted under the ordinance. Thus, notice to disperse on pain of arrest does not comport with this Court's mandate that persons "are entitled to be informed as to what the State commands or forbids." *Lanzetta*, 306 U.S. at 451, 453.

Moreover, the Illinois Supreme Court properly noted that the City's position is directly inconsistent with this Court's teaching in *Shuttlesworth*. Pet. App. at 13a. Under *Shuttlesworth*, a mere loitering law that only notifies a person that he acts illegally if he does not move on is a law that is unconstitutionally vague. *See supra*, at 7. *See also Wright v. Georgia*, 373 U.S. 284, 291-92 (1963) ("one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution"); *Kirkwood*, 323 F. Supp. at 616 (sections of ordinance that "are conditioned upon the failure to `move' when directed to do so by a policemen . . . make an individual's continued presence on a public street conditioned upon the permission of a policeman" and are unconstitutionally vague and overbroad).

Notwithstanding *Shuttlesworth*, the City argues that *Colten v. Kentucky*, 407 U.S. 104 (1972) is "dispositive" as to the constitutionality of loitering ordinances that contain move on order requirements. Pet. at 11. It is mistaken. *Colten* concerns a disorderly conduct statute that defined with a specific intent requirement the underlying conduct that it made subject to an order of dispersal: "[acting] with intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof . . . ." *Colten*, 407 U.S. at 108. In the Court's view, a person of ordinary intelligence can and would understand the conduct prohibited by this statute — it certainly is not "apparently" aimless conduct. There is nothing in *Colten* that re-

motely suggests that the dispersal component of the ordinance was germane to the Court's analysis. Nor is there the slightest hint in *Colten* that a move on order can save an otherwise vague loitering ordinance.

In sum, the dispersal requirement does nothing to prevent the Chicago ordinance from being a prohibition on mere loitering and from therefore failing to notify persons of ordinary intelligence as to what conduct it prohibits.

The ordinance also fails the second, and more important, prong of the vagueness doctrine, namely, the requirement that a legislature establish minimal guidelines to govern law enforcement. *Kolender*, 461 U.S. at 358. The Illinois Supreme Court correctly recognized that the ordinance provides no such guidelines and allows "absolute discretion to police officers to decide what activities constitute loitering." Pet. App. at 15a. Because the ordinance vests such discretion in police officers, it encourages arbitrary or discriminatory enforcement, and is therefore unconstitutionally vague. *Kolender*, 461 U.S. at 357.

In condemning the loitering law in *Shuttlesworth*, this Court described the unfettered discretion given to law enforcement under a loitering law as allowing a person to remain on a public sidewalk "only at the whim of any police officer of that city." 382 U.S. at 90. Chicago's prohibition criminalizing being in a public place with "no apparent purpose" leaves police officers with the same unfettered discretion. As the court in *Timmons* observed:

> How does one initially determine when a person is loitering or wandering without 'apparent' reason or business? Is it by the person's gait, posture or countenance? Or is it by the person's dress or apparent wealth or poverty —or race or nationality? What is 'apparent' idle conduct will vary depending upon the personal experiences and prejudices of the person viewing the conduct; in other words, what conduct is 'without apparent reason or business' can only be in the 'eye of the beholder.'

658 F. Supp. at 1089. Lacking any enforcement standards, the ordinance permits a "standardless sweep [that] allows policemen . . . to pursue their personal predilections." *Kolender*, 461 U.S. at 358

(citation omitted). *See also Nunez v. City of San Diego*, 114 F.3d 935, 943 (9th Cir. 1997) (an ordinance's prohibition that relies "on the police officer's perception of whether conduct is aimless" is standardless).

The City argues that because "an arresting officer must satisfy an objective test for identifying which groups of loiterers are subject to the ordinance," the ordinance adequately limits police discretion and so survives a vagueness challenge. Pet. at 10. This is an alarming view of due process (and the proper role of law enforcement) under which vague penal laws are allowed to be enforced as long as their scope is restricted to certain groups of persons and their associates. Sadly, it only serves to underscore this Court's concern that a vague loitering law "furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Kolender*, 461 U.S. at 360 (quoting *Papachristou*, 405 U.S. at 170.)

Though objective standards for determining against whom a law may be enforced are constitutionally necessary, a law (of which Chicago's ordinance is a striking example) that fails adequately to specify the underlying conduct it prohibits — no matter how clearly it delineates its targets — still vests unfettered discretion in police officers. *See, e.g., Ricks v. District of Columbia*, 414 F.2d 1097, 1100, 1105 (D.C. Cir. 1968) (part of statute prohibiting any "pickpocket, thief, burglar, confidence operator, or felon" from loitering held to be standardless and thus unconstitutionally vague). In rejecting the City's argument below, the Illinois Supreme Court wrote: "... although the general police order goes to great lengths to define criminal street gangs, it does absolutely nothing to cure the imprecisions of the definition of the "loitering" element of the crime." Pet. App. at 16a. Such a law remains, for that reason, unconstitutionally vague.

In short, precisely because the Chicago ordinance sets no standard with its prohibition on being in public with "no apparent purpose," it fails to provide guidance to police officers as to how or when to enforce it even with respect to the subset of the general population to which it applies. No amount of tinkering with, or interpreting, *other* parts of the ordinance will cure this underlying and fatal grant of unfet-

tered discretion to police officers; and thus no amount of such tinkering can save the ordinance from unconstitutionality.[7]

While this Court has recognized the legitimacy of the government's interest in fighting crime it has been steadfast in its commitment to the requirements of Due Process. As Justice O'Connor wrote for the Court in *Kolender*, "[a]s weighty as this concern [with curbing criminal activity] is, ... it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity." 461 U.S. at 361.

2. There is no lower court disagreement as to the constitutionality of laws that seek to prohibit mere loitering.

The City devotes a substantial portion of its petition attempting to establish that there is a split among lower courts over the constitutionality of both loitering laws based on the Model Penal Code ("MPC-based ordinances") and loitering laws that include an intent to engage in a particular crime. It then argues that these alleged disagreements somehow implicate the Illinois Supreme Court decision striking down Chicago's mere loitering ordinance. Pet. at 14-18.[8] The City, however, is mistaken on both points.

First, in striking down Chicago's ordinance, the Illinois Supreme

[7] Because of this intended vagueness in the ordinance, the Illinois Supreme Court refused to give the law a limiting constriction. Pet. App. at 16a. The Court wrote:

> ... Although the proscriptions of the ordinance are vague, the city council's intent in its enactment is clear and unambiguous. The city has declared gang members a public menace and determined that gang members are too adept at avoiding arrest for all the other crimes they commit. Accordingly, the city council crafted an exceptionally broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets. *Id.*

[8] In addition, the City discusses ordinances that purport to regulate noise, cruising, and sleeping in public places. But these are not loitering ordinances; and whatever difficulties (if any) lower courts have had in determining the constitutionality of such ordinances are irrelevant to the question of whether a mere loitering ordinance can pass constitutional muster.

Court did no more than follow this Court's decisions clearly establishing that a criminal prohibition on mere loitering is unconstitutionally vague.[9] Since *Papachristou*, there has been no controversy whatsoever over that proposition. Indeed, the clarity of this rule has resulted in very few mere loitering ordinances even being litigated. When such laws have been litigated, they have been struck down on vagueness grounds. *See Kirkwood*, 323 F. Supp at 616; *People in Interest of C.M.*, 630 P.2d at 596-97; *Richard*, 836 P.2d at 624.

Because there is no controversy as to the rule of decision correctly applied by the Illinois Supreme Court to strike down the Chicago ordinance, any lower court disagreement over the constitutionality of some *other* kind of loitering ordinance has no relationship to any controversy that could properly be before this Court by issuing a writ of certiorari in this case.

Second, the City overstates the extent of lower court disagreement about these other loitering laws. The clear consensus, adhered to and explained by the Illinois Supreme Court, is that a loitering law will be constitutional where a sufficiently defined "second specific element" such as "some other overt act or criminal intent" is joined to the act of loitering "to form the prohibited conduct." Pet. App. at 11a.

When viewed in this context, the alleged split in the specific intent cases evaporates. The courts that have struck down loitering ordinances with additional intent elements have done so simply because the added elements in the particular laws were not clearly defined. *See, e.g., Brown v. Municipality of Anchorage*, 584 P.2d 35, 37-8 (Alaska 1978) (list of circumstances to be considered in determining if a person manifested a purpose to engage in prostitution ineffective to clearly delineate prohibited conduct); *Wyche v. State*, 619 So.2d 231, 237 (Fla. 1993) (same); *Akron v. Rowland*, 618 N.E.2d 138, 146 (Ohio 1993) (list of circumstances that may be considered to determine if a person manifests a purpose to engage in drug-related activity, because it was not exhaustive, caused a "lack of specificity .

[9] The Illinois Supreme Court recognized that the Chicago ordinance remains a mere loitering ordinance despite its gang membership and move-on order requirements. As we show in Section 1 neither of these requirements alters the fact that the central element of the offense, loitering, suffers from fatal vagueness.

. . fatal to the ordinance"). There is no suggestion in any of these cases that a loitering ordinance joining a sufficiently defined intent element to loitering in order to define the criminal act, would not satisfy due process.

As to cases confronting MPC-based ordinances, the cases that do uphold such ordinances recognize the rule embraced by the Illinois Supreme Court;[10] and the sole controversy between them and the courts striking down MPC-based ordinances is whether the additional element supplied by such ordinances is also vague.

Consequently, there is no significant disagreement amongst the lower courts as to the constitutionality of a loitering law that adds a second specific, and clearly delineated, element to the conduct of loitering. But, in any event, the Chicago loitering ordinance presents no occasion for this Court to consider that issue. The Chicago ordinance is a mere loitering ordinance, the unconstitutionality of which is simply not in doubt under this Court's decisions.[11]

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[10] *See, e.g., State v. Ecker*, 311 So.2d 104, 107 (Fla. 1975) ("[w]e readily recognize that if the statute broadly proscribed loitering or idling, without more, it would be unconstitutional"). *See also Salt Lake City v. Savage*, 541 P.2d 1035, 1038 (Utah 1975).

[11] The Chicago ordinance is obviously void for vagueness even under the proposal made by Debra Livingston in *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 Colum. L.Rev. 551, 669 (1997), an article cited with approval by the City. Pet. at 18, 23, 25. Professor Livingston suggests that laws that are "reasonably specific," and regarding which "legislatures or police departments have taken reasonable steps to narrow the opportunity for arbitrary police enforcement" should withstand vagueness challenges. 97 Colum L. Rev. at 669. In addition, and quite ironically, two of the other commentators cited by the City specifically discuss the Chicago ordinance, and argue that, as it stands, it is void for vagueness. *See* Peter W. Poulos, *Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 Calif. L. Rev. 379, 408-13 (1995) (suggesting the addition, *inter alia*, of an overt act element to the ordinance); Joel D. Berg, *The Troubled Constitutionality of Antigang Loitering Laws*, 69 Chicago-Kent L. Rev. 461, 485-88 (1993) (suggesting, in addition, that adding intent and overt act elements will render loitering ordinances safe from vagueness attacks).

3. The ordinance violates substantive due process.

The Illinois Supreme Court correctly held that the gang loitering ordinance violates substantive due process. The Fourteenth Amendment's guarantee of due process of law includes a substantive component that "forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). However, even where fundamental rights are not at stake, substantive due process safeguards personal liberties — including the freedoms of movement and association identified by the Illinois Supreme Court — against arbitrary governmental action by requiring that laws and regulations that would abridge them be, at the very least, "rationally related to legitimate governmental interests." *Washington v. Glucksberg*, ____ U.S. ____, 117 S. Ct. 2258, 2271 (1997); *see also Swank v. Smart*, 898 F.2d 1247, 1251-52 (7th Cir. 1990). Contrary to the City's representation, Pet. at 18, the Illinois Supreme Court did not conclude that there is a fundamental right to loiter. Rather, it correctly determined that Chicago's ordinance violates substantive due process even under the lenient standard of review advocated by the City. Because the ordinance fails the very test urged by the City, its petition should be denied.

This Court has long recognized freedom of movement as an integral component of personal liberty. Nearly a century ago, the Court observed that "[u]ndoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment . . . ." *Williams v. Fears*, 179 U.S. 270, 274 (1900).

It is likewise well established that loitering ordinances restrain this right to freedom of movement. *Territory of Hawaii v. Anduha*, 48 F.2d 171, 172 (9th Cir. 1931). Indeed, this Court recently expressly recognized that a loitering ordinance before it (similar to Chicago's) "implicate[d] consideration of the constitutional right to freedom of

movement." *Kolender*, 461 U.S. at 358. *See also Shuttlesworth*, 382 U.S. at 96 (Douglas, J., concurring) ("[f]ailure to obey [a police officer's order to move on], when one is not acting unlawfully, certainly cannot be made a crime in a country where freedom of locomotion is honored") (citation omitted).

Several recent lower court decisions considering constitutional challenges to curfew ordinances have similarly identified freedom of movement as an integral aspect of personal liberty protected by the Fourteenth Amendment's Due Process Clause. *See Nunez*, 114 F.3d at 935, 944, 948-49; *Hutchins v. District of Columbia*, 942 F. Supp. 665, 670-71, 674, 680 (D.D.C. 1996); *Waters v. Barry*, 711 F. Supp. 1125, 1134, 1139-40 (D.D.C. 1989); *Gaffney v. City of Allentown*, No. CIV-A-97-4455, 1997 WL 597989, *5, *8 (E.D. Pa. Sept. 17, 1997). Thus, far from being the maverick the City paints it, the Illinois Supreme Court aligned itself squarely with this Court and others when it recognized that the City's ordinance abridges the right to freedom of movement.

This Court also has long afforded considerable constitutional shelter to the related freedoms of assembly and association. In *DeJonge v. Oregon*, 299 U.S. 353, 365 (1937), for example, the Court unanimously held that:

> [C]onsistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. . . . If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

Subsequently, in holding unconstitutional a municipal ordinance that prohibited persons from assembling on a sidewalk and conducting themselves in a manner annoying to persons passing by, the Court explained that were the rule any different, "the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension . . . ." *Coates*, 402 U.S. at 615. *See also Kolender*, 461 U.S. at 358 (recognizing danger to First Amendment in striking down loitering ordinance).

This right is abridged by Chicago's ordinance because the law permits the dispersal or arrest of a gang member and his companions who are associating in public to debate the constitutionality of the ordinance, or of community workers who are associating with a gang member in an outreach program. Pet. App. at 57a. *Supra*, at 9. Moreover, gang members cannot publicly associate even with members of their immediate family without being subject to confrontation and arrest. Indeed, they may not associate with their relatives in as basic an aspect of life as getting some fresh air together outside their apartment. *Supra*, at 8-9.

The City's reliance on *City of Dallas v. Stanglin*, 490 U.S. 19 (1989), is misplaced for the simple reason that, as just shown, Chicago's ordinance restricts by its terms much more than "chance encounters" of the sort at issue in *Stanglin*. More importantly, as the Illinois Supreme Court correctly recognized, even those forms of association outside the core of the First Amendment are protected by the Fourteenth Amendment against such unreasonable and arbitrary governmental action as the ordinance here. Pet. App. at 18a-19a. *See also Swank*, 898 F.2d at 1251-52.[12]

Nor is the City aided by *People ex rel. Gallo v. Acuna*, 60 Cal. Rptr. 2d 277 (1977), *cert. denied*, 117 S. Ct. 2513 (1997). The *Acuna* court reviewed, for abuse of discretion only, a narrowly tailored civil injunction, issued pursuant to the state's public nuisance statute, that proscribed specific conduct by certain defendants in a four-square-block neighborhood. *Id.* at 282-83, 295-96. Moreover, its analysis of associational interests was highly contextual,

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[12] Nor does *Colten v. Kentucky*, 407 U.S. 104 (1972), advance the City's cause. That case involved a disorderly conduct statute that, unlike Chicago's ordinance, required a specific intent to "cause public inconvenience, annoyance or alarm," and the defendant there was convicted for failing, after five warnings, to leave the crowded roadside scene of a traffic violation. 407 U.S. at 108-109. The Court's holding as to the First Amendment was limited to its conclusion that the "defendant had no constitutional right to observe the issuance of a traffic ticket or to engage the issuing officer in conversation at that time." *Id.* at 109.

amounting in short to the conclusion that "the First Amendment [did not] protect the collective public activities of the gang members within ... [the particular four-block neighborhood involved], activities directed in the main at trafficking in illegal drugs and securing control of the community through systematic acts of intimidation and violence." *Id.* at 289. Consequently, the City's reliance on *Acuna* to support its blanket prohibition on simple loitering is sorely misplaced. [13]

Thus the Illinois Supreme Court was justified in concluding that the ordinance impedes upon the rights to freedom of movement and association — personal freedoms protected under the Due Process Clause. It was equally justified in rejecting the ordinance as unconstitutional on the minimal ground that it constitutes "an *arbitrary restriction* on personal liberty... [because] [p]ersons suspected of being in criminal street gangs are deprived of the personal liberty of being able to freely walk the streets and associate with friends, regardless of whether they are actually gang members or have committed any crime." Pet. App. at 18a-19a (emphasis supplied). *See Glucksberg*, 117 S. Ct. at 2271 (the Constitution requires at a bare minimum that laws impeding on personal liberties protected by the Due Process Clause "be rationally related to legitimate government interests").

The Illinois Supreme Court's decision is anchored in precedent as well as in logic. Time and again, this Court and others have rejected "prophylactic" justifications for laws, like Chicago's ordinance, that broadly trample constitutional freedoms. *Papachristou*, 405 U.S. at 171. Moreover, the Illinois Supreme Court is not the first tribunal to conclude that a wholesale deprivation of constitutional liberties in the name of crime prevention is too far divorced from any legitimate governmental interest to pass muster even under mere reasonableness review. In *Fenster v. Leary*, 229 N.E.2d 426 (N.Y. 1967), for

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[13] The City's remaining cases, *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996), and *Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990), merit the short shrift the City pays them. *See* Pet. at 21. Both cases involved ordinances narrowly targeted at particular forms of disruptive conduct (sitting and lying in the sidewalk and vehicular cruising, respectively) during limited times and in limited places. Neither case involved anything like the sweeping, admittedly "prophylactic" measure the City champions here. *See Roulette*, 97 F.3d at 302; *Lutz*, 899 F.2d at 256-57, 270.

example, the New York Court of Appeals reviewed a vagrancy statute whose primary targets were "alcoholic derelicts and other unfortunates" and "suspected criminals, with respect to whom the authorities do not have enough evidence to make a proper arrest or secure a conviction on the crime suspected," *id.* at 430. The court struck down the statute, concluding that it was not reasonably related to legitimate ends of government and, accordingly, "violate[d] due process and constitute[d] an overreaching of the police power," *id.* at 428. Likewise, in invalidating a loitering ordinance similar to the one at issue here, the Oklahoma Court of Criminal Appeals explained that "[t]o forbid people from being on public streets as a preventive measure rings of a totalitarian police state operated for the efficiency of the government and not in the interest of a free people. All citizens are justly concerned about crime. But, that concern must take rational expression and not become a mindless fear that erodes the rights of a free people." *Hayes v. Municipal Court*, 487 P.2d 974, 980 (Okla. Ct. Crim. App. 1971). *See also Gordon v. Schiro*, 310 F. Supp. 884, 886-87 (E.D. La. 1970) (vagrancy ordinance); *Alegata v. Commonwealth* 231 N.E.2d 201, 205-10 (Mass. 1967) (loitering and vagabond ordinances).

Because the Illinois Supreme Court correctly determined that Chicago's ordinance violates substantive due process even under the minimal level of scrutiny advocated by the City, its petition should be denied.

4. The ordinance also violates other rights.

Chicago's loitering ordinance is unconstitutional not only because it is vague and violative of substantive due process, but also on the additional grounds — not reached by the Illinois Supreme Court — that it is overbroad, punishes status rather than conduct, and permits arrest without probable cause to believe that a crime has been or will be committed. All of these constitutional infirmities were recognized by the Illinois Appellate Court. Pet. App. at 2a, 33a, 35a.

First, a statute (or ordinance) is unconstitutionally overbroad when it reaches a "substantial" amount of constitutionally protected con-

duct. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Mere loitering laws unquestionably suffer from this vice. This Court recognized that the loitering law in *Shuttlesworth* was "[i]nstinct with its ever-present potential for arbitrarily suppressing First Amendment liberties . . . ." 382 U.S. at 90-91. And, the Court echoed this theme in *Kolender* where it again dealt with a broadly worded loitering law. 461 U.S. at 358. *See also Coates*, 402 U.S. at 615-16 (ordinance violated rights of assembly and association).

Application of the loitering ordinance would cut a wide swath through the First Amendment's protection of freedom of speech and association. Subject only to the individual police officer's determination whether a particular group of persons sufficiently manifested an "apparent purpose," the ordinance would permit the arrest of any group reasonably believed to include a gang member regardless what the actual reason for their presence might be. Thus, as the trial court below rightly observed, the ordinance would subject to arrest a social worker talking to a gang member on the street, as well as two friends who passed on the street and stopped for a brief conversation. Pet. App. at 57a. And, as explained above, the City itself acknowledges that the ordinance would apply where persons were engaged in protected expressive association. *Supra*, at 9.

The City contends that the ordinance would "rarely if ever" apply to protected expression because activities such as "picketing or protests" would have purposes apparent to police and therefore not be perceived by police as loitering. Pet. at 19. This is precisely the sort of delegation this Court has condemned as "entrusting lawmaking 'to the moment-to-moment judgment of the policeman on his beat.'" *Smith v. Goguen*, 415 U.S. 566, 575 (1974) (quoting *Gregory v. Chicago*, 394 U.S. 111, 120 (1969) (Black, J., concurring)). Beyond that, however, the City's argument asks this Court to find in the ordinance an ill-defined exception for First Amendment activities that is nowhere found in its text or in any binding judicial or administrative construction of its text. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769-70 & n.11 (1988). Moreover, it is far from self-evident that the purposes of even the expressive activities the City identifies would be "apparent" to police. Finally, and most important, First Amendment protection is not limited to

picketing and protests, *see, e.g., Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569, 575 (1987), and one need look no further than the City's own statements to see that the ordinance would apply even to peaceable association for lawful debate and other expressive activities.[14]

Second, the gang loitering ordinance unconstitutionally criminalizes status because it permits arrest and conviction in the complete absence of any prohibited *actus reus*. *Robinson v. California*, 370 U.S. 660, 666-67 (1962); *Powell v. Texas*, 392 U.S. 514, 533 (1968). The City argues that the ordinance criminalizes conduct because two acts are required: loitering and failure to obey an order to disperse. But as the Illinois Appellate Court concluded, the ordinance "prohibits gang members from loitering because they are gang members, not because they are loitering. Non-gang members and those not associating with gang members are not prohibited from loitering." Pet. App. at 35a.

Third, the Fourth Amendment permits arrest only when a police officer has probable cause to believe that a person has committed or is about to commit a crime. *Henry v. United States*, 361 U.S. 98 (1959) The City's argument that the ordinance comports with this requirement because it only permits arrest after a person has disobeyed a police order to move along misses the point. A person cannot constitutionally be punished for disobeying a police order that is itself unconstitutional. *Wright*, 374 U.S. at 291-92. Accordingly, the Illinois Appellate Court correctly held that the ordinance amounts

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[14] The ordinance cannot survive the strict scrutiny required to abridge these rights. Even assuming, *arguendo* that the amelioriation of violent and drug-related crime is a compelling state interest, the means chosen by the City to further that end are not the least restrictive. As the Illinois Supreme Court noted, "[t]he city is not helpless in its war against the criminal activity of gangs. Many of the offensiveactivities the city claims the gang loitering ordinance will deter are already criminal acts." Pet. App. at 19a (citing statutes). In addition to these criminal remedies, the City also has available to its civil remedies, directed specifically at gang-related activities, under the Illinois Streetgang Terrorism Omnibus Prevention Act, 740 ILCS 147/1. Such laws serve the same ends as the ordinance at issue here, but do so by means "directed with reasonable specificity toward the conduct to be prohibited." *Coates*, 402 U.S. at 614.

to a transparent attempt to avoid the probable cause requirement by permitting arrest based on an individual's suspected association with a gang member, rather than on probable cause that a crime has been or is about to be committed.

Finally, the City's argument that an order to move along is not a "seizure" is disingenuous, as each of the respondents in this case was arrested pursuant to the ordinance, which commands police officers "promptly" to arrest any person who disobeys an order to move along.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

CITY OF CHICAGO,

Petitioner.

v.

JESUS MORALES, et al.,

Respondents.

Petition for a Writ of Certiorari to the
Supreme Court of Illinois

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an ordinance which criminalizes "remaining in one place with no apparent purpose" in association with a person believed by a police officer to be a gangmember is void for vagueness by failing to place a reasonable person on notice of what conduct to avoid and/or by encouraging arbitrary and discriminatory enforcement?

2. Whether an ordinance which arbitrarily and unreasonably criminalizes "remaining in one place with no apparent purpose" in association with a person believed by a police officer to be a gangmember violates substantive due process guarantees?

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BRIEF IN OPPOSITION TO
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Respondents, Jesus Morales et al., respectfully request that this Court deny the City of Chicago's Petition for a Writ of Certiorari to review the judgment of the Supreme Court of Illinois in these cases.

JURISDICTION

This Court does not have jurisdiction over the questions presented in the City's Petition with respect to the respondents, together or individually, because the decision of the Illinois Supreme Court rested on adequate and independent state grounds.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the provisions listed in the City's Petition, these cases involve Article I, section 2 of the Illinois Constitution.

STATEMENT OF THE CASE

The City's Petition describes the enactment of its gang loitering ordinance but omits any discussion of the records of the individuals who were convicted and sentenced for violation of that ordinance.

Jesus Morales

At a bench trial, Officer Ray Frano testified that he saw approximately six young male Hispanics standing at the street corner by 1100 West Belmont "(t)alking to citizens on the street." (Morales, R. 6). That Chicago neighborhood was predominately Caucasian. (Morales, R. 12-13). Officer Frano approached the Hispanic teenagers on the corner with the stated reason: "(b)ecause we wanted to know if they lived in the neighborhood or from the neighborhood." (Morales, R. 7). He told the group of Hispanic teenagers that he would arrest them if they did not leave. (Morales, R. 8, 10-11). Officer Frano left the scene. (Morales, R. 11). When he returned later, he arrested Jesus Morales and another person at the corner for gang loitering. (Morales, R. 11). According to Officer Frano, he believed Morales was a gang member because Morales wore blue and black clothing. (Morales, R. 9-10, 12).

Jesus Morales testified that he was pausing at the intersection while walking on crutches home from a nearby hospital. (Morales, R. 17-18, 19-21). After Morales told Officer Frano that he had no outstanding warrants, Officer Frano arrested him for gang loitering. (Morales, R. 18-19). Morales himself was not a gangmember although he knew that the other person present on the corner was a Gangster Disciple. (Morales, R. 19).

The trial court found Morales guilty of gang loitering and sentenced him to 1 day in the Cook County Jail. (Morales, R. 23, 24).

Gregorio Gutierrez

Officer Matthew Craig testified at a bench trial that he observed Gregorio Gutierrez standing at the corner of Broadway and Winona Streets in Chicago with two other men "doing absolutely nothing." (Gutierrez, R. 8-9, 12). Officer Craig and his partner immediately told them to break up and leave the area. (Gutierrez, R. 12, 18-19). Officer Craig and his partner drove off around the block. (Gutierrez, R. 12, 19). When they returned, they saw Gutierrez standing at the same corner and arrested him for gang loitering. (Gutierrez, R. 12, 13, 18). According to Officer Craig, Gutierrez had told him on previous occasions that he belonged to the Latin Kings. (Gutierrez, R. 11-12).

Gregorio Gutierrez testified that he had left his home with his brother and was walking towards a nearby El stop to go to

their mother's place of employment. (Gutierrez, R. 24-25, 28). Along the way, they stopped to purchase a sandwich and soda from a store. (Gutierrez, R. 24-25, 28). Officer Craig and his partner drove up to them at the corner and arrested them without ever telling them to leave. (Gutierrez, R. 26-27, 29). When Gutierrez asked why he was being arrested, "they told us they don't like us." (Gutierrez, R. 27, 29).

Gutierrez never told Officer Craig that he was a member of the Latin Kings. (Gutierrez, R. 29). Gutierrez was no longer a member of the Latin Kings and had not been a member on June 3, 1993. (Gutierrez, R. 30). No one else with him at the corner was a member of the Latin Kings. (Gutierrez, R. 30).

The trial court found Gutierrez guilty and sentenced him to 27 days in the Cook County Jail. (Gutierrez, R. 32, 37).

Daniel Washington

At a bench trial, Officer Estrella testified that on March 13, 1994, at 7:45 p.m. at 2942 West Fulton in Chicago about 150 feet from a store, he drove up to "several youths out there yelling and screaming at passing cars and stuff like that. Just being loud on the street." (Washington, R. 9-10, 17, 19). Officer Estrella observed the youths for a minute or two before approaching them. (Washington, R. 18). Daniel Washington was in the group of youths. (Washington, R. 10). A couple of the youths admitted that they were Vice Lords but Officer Estrella could not recall which ones. (Washington, R. 11, 16-17). Officer Estrella told them to disperse for the stated reason

that "they were running too deep, meaning too many of them out there." (Washington, R. 11).

Officer Estrella took off for an hour or hour and a half. (Washington, R. 11, 18). When he returned, he saw the same youths at the corner, went immediately up to them and told them to disperse. (Washington, R. 11, 18). Officer Estrella left for another unspecified length of time and arrested Washington and the other youths when he returned, telling them "they didn't want to listen so we're taking them in for gang loitering." (Washington, R. 12, 18-19). According to Officer Estrella, Washington admitted subsequent to his arrest that he belonged to the Vice Lords. (Washington, R. 16).

Barbara Ann Williams Washington, Daniel's mother, testified that her son was not a member of any gang. (Washington, R. 27).

Daniel Washington testified that he went to the unfamiliar neighborhood of Sacramento and Fullerton with a friend. (Washington, R. 28, 31). While his friend stopped to talk to some people Daniel did not know, Daniel went into a nearby store. (Washington, R. 29, 31-32). When he came out 15 or 20 minutes later, he was arrested. (Washington, R. 29-30, 32). No one asked, and Daniel did not tell anyone that he was in the Vice Lords. (Washington, R. 31).

The trial court found Daniel Washington guilty and sentenced him to 20 days in the Cook County Jail. (Washington, R. 35-36).

Jose Renteria

At a bench trial, Officer Pena testified that Jose Renteria's name appeared on a gang card file on the Satan Disciples maintained by the Chicago Police Department. (Renteria, R. A13). The card was not produced at trial. (Renteria, R. A14). Officer Pena identified members of the Satan Disciples by the area they hung out, by the hand signals they flashed and by the colors they wore although she stated that "they don't always wear them." (Renteria, R. A26-29).

On July 9, 1994 at 11:30 p.m., Officer Pena went in plainclothes to 1600 West Ohio in Chicago. (Renteria, R. A14-A15). She saw Jose Renteria with two members of the Satan Disciples "hanging out" on the corner. (Renteria, R. A16-A17). Officer Pena had ordered them to leave 15 or 20 minutes before. (Renteria, R. A18, A22-A23, A24-A25). According to Officer Pena, she considered her order to leave to apply to anywhere in the general vicinity of the corner although she had only specifically told them to leave the corner itself. (Renteria, R. A22-A23, A25). When ordered to leave, they had walked away. (Renteria, R. A22). She arrested Jose Renteria but no one else for gang loitering without again warning him to leave. (Renteria, R. A18, A20, A23).

The trial court found Renteria guilty and sentenced him to one day in the Cook County Jail. (Renteria, R. A35-A38).

Sandy Garvin

The parties stipulated at a bench trial to the following testimony of Officer Fran:

> On February 12, 1993, at approximately 8:50 in the evening, he encountered the defendant Sandy Garvin along with another individual Jerry Davi loitering in the vicinity of 2750 North Hoyne for no apparent purpose.
>
> The officer approached the individual based on his reasonable belief that the Defendant along with Mr. Jerry Davi were members of a Latin Kings criminal street gang. His belief was based on self-admission by the parties and by tattoos that were on each of their bodies.
>
> Based on this reasonable belief, Officer Fran ordered Mr. Garvin and Mr. Davi to disburse (sic). Mr. Garvin failed to disburse (sic) upon the officer's order.

(Garvin, R. 9). Based on this stipulation, the court found Garvin guilty of gang loitering and sentenced him to 2 days in the Cook County Department of Corrections. (Garvin, R. 10).

Raul Jimenz, Jr.

The Complaint alleged that on February 15, 1993 at 1324 W. 18th Place, Chicago, Illinois, Raul Jimenz, Jr. "knowingly remained at a known designated location for criminal street activity, after being informed by a police officer to disperse from this area. Further, the above, is a known member of a criminal street gang, to wit: 'Ambrose.'" (Jimenz, CLR. 2).

At a bench trial, the parties stipulated to the facts in the complaint. (Jimenz, R. 3-4). The court found Jimenz guilty of gang loitering and sentenced him to six months of supervision and 7 days of community service. (Jimenz, R. 4-5).

REASONS FOR DENYING THE PETITION

This Court should not entertain the City of Chicago's Petition for a Writ of Certiorari. Reversal would not change the outcome for the litigants here. The Illinois Supreme Court's opinion was based on the separate and independent ground of the Illinois Constitution, state caselaw and a determination that the evidence presented at the trials of respondents who were convicted did not prove that the police officers adhered to the ordinance and its accompanying general order. In addition, the Illinois Appellate Court found the City's gang loitering ordinance to be unconstitutional on at least three other grounds not reached by the Illinois Supreme Court.

Nor is review warranted by the importance of the questions presented. The decision of the Illinois Supreme Court holding the City's gang loitering ordinance to be vague and in violation of substantive due process was focused on the specific language before it. As such, that decision neither stands in conflict with other jurisdictions nor has an impact beyond the litigants in the Illinois courts. In any event, the Illinois Supreme Court correctly determined that an ordinance which criminalized "remaining in one place with no apparent purpose" in association with a person whom a police officer believed to be a gang member was void for vagueness and violated rights of substantive due process.

1. This Court should not grant review because the decision of the Illinois Supreme Court rested on adequate and independent state grounds. The opinion cites the Illinois Constitution in support of the finding that the Ordinance violates due process. Petition Appendix at p. 6a, citing Ill. Const. art I, section 2. The Illinois Constitution has been interpreted to stand separate and independent from the federal guarantee of due process. See e.g. Rollins v. Elwood, 141 Ill.2d 244, 275, 565 N.E.2d 1302 (1990). The Illinois Supreme Court also placed heavy reliance on People v. Nash, 173 Ill.2d 423, 431, 672 N.E.2d 1166 (1996), which expressly invoked only state law in support of its holdings. Petition Appendix at pp. 11a-12a.

Moreover, the Illinois Supreme Court found that "a thorough examination of the record reveals that police officers have not followed the guidelines of the general order in a uniform manner." Petition Appendix at p. 16a, n. 1 (specifically discussing the evidence presented at the trial of respondent Jesus Morales). See e.g. California v. Freeman, 488 U.S. 1311, 109 S.Ct. 854, 102 L.Ed.2d 957 (1989) (decision that defendant's conduct was not within statutory definition of crime furnished adequate and independent state ground for reversing conviction). As in Freeman, were this Court to review these cases and hold that the Illinois Supreme Court misinterpreted federal law, on remand the Illinois Supreme Court would nevertheless reach the same result based on the state law

grounds that the City failed to prove that the police followed the ordinance and its accompanying general order.

Review of the questions presented in the City's Petition would also be a futile gesture here because the Illinois Appellate Court found the City's ordinance to be unconstitutional on at least three additional grounds not reached by the Illinois Supreme Court. Petition Appendix at p. 21a. Clearing only the two hurdles of vague language and substantive due process cannot remove those other obstacles to reinstating this flawed ordinance.

2. In any event, contrary to the City's assertions in its Petition, there is no relevant conflict here because the instant ordinance is not similar to the laws addressed by the City.

The Illinois Supreme Court properly ruled that an ordinance which criminalized "remaining in one place with no apparent purpose" was void for vagueness. The City's Petition points to other cases purportedly in conflict with this decision. Petition at p. 14. However, none of the cited regulations penalized loitering "with no apparent purpose." Instead, as the Illinois Supreme Court recognized, ordinances which have been upheld by other courts have all included a requirement of some overt act or criminal intent. Petition Appendix at pp. 10a-11a. Those containing language similar to the City's ordinance have been struck down. Petition Appendix at pp. 10a-11a.

Similarly, the City's contention that lower courts are in irreconcilable disagreement about the scope of the vagueness doctrine in general and Papachristou in particular ignores the nature of a void-for-vagueness challenge. Petition at pp. 14-18, citing Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). In determining whether a statute is vague, a court must analyze the precise words of that particular statute. See e.g. Petition Appendix at pp. 6a-7a. It is hardly remarkable that courts have come to different conclusions about various loitering laws when such laws are rarely drafted with uniform language.

In addition to the purported split of authority over loitering laws, the City alleges the existence of other unrelated conflicts over such laws as the Model Penal Code, cruising ordinances, and prohibitions against sleeping in public. Petition at pp. 16-17. However, the City does not explain how resolution of any of those purported conflicts would lead to a reversal of the Illinois Supreme Court's decision about the instant ordinance. Similarly, while the City complains about the uncertain scope of Papachristou with respect to other regulations, it does not advance any argument that the Illinois Supreme Court misapplied Papachristou's holding to the ordinance at issue here.

Finally, the City claims that the decision of the Illinois Supreme Court about substantive due process is in conflict with the decision of the California Supreme Court in People ex rel. Gallo v. Acuna, 14 Cal. 4th 1090, 929 P.2d 596, 60 Cal. Rptr. 2d

277, cert. denied 117 S.Ct. 2513 (1997). Acuna is clearly distinguishable because it involved not a criminal law but an injunction entered against a small group of specified individuals. Here, in contrast, the City enacted a general criminal law which it enforced against 45,000 people. Petition at p. 9. The Illinois Supreme Court further distinguished Acuna on the basis that the language of the injunction there required actual knowledge of gangmembership instead of the "reasonable belief of a police officer" language in the City's ordinance. Petition Appendix at p. 12a. Likewise, there is no conflict with City of Dallas v. Stanglin, 490 U.S. 19, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989), which upheld a dancehall regulation under the exercise of parens patriae powers. Petition at p. 19.

Accordingly, there is no meaningful conflict here which would warrant this Court's review.

3. Nor is there any basis for the City's contention that "under the approach taken in the decision below, it is decidedly unlikely that any loitering ordinance could survive constitutional attack." Petition at p. 10.

The Illinois Supreme Court's decision about the precise language of this particular ordinance does not doom all regulation of loitering. The opinion itself points out that "when the term 'loitering' is joined with a second specific element to form the prohibited conduct defined by a criminal loitering statute, courts have uniformly found that the law sufficiently informs persons as to the forbidden conduct, and

thus, is not vague." Petition Appendix at p. 11a. The Illinois Supreme Court noted that statutes combining loitering with another overt act or criminal intent furnished examples of sufficiently specific second elements. Petition Appendix at p. 10a.

Consequently, if the City wishes to reap the supposed benefits of the "Broken Windows" theory of law enforcement or to avoid potential civil liability under Section 1983, it may simply amend its loitering ordinance to any one of the myriad formulations which have been upheld in other jurisdictions.

4. The decision of the Illinois Supreme Court was correct on the merits and in no way amounts to "serious misapplication of vagueness doctrine." Petition at p. 10.

The City argues that an order from a police officer tells suspects "precisely what they must do - move along - to avoid arrest." Petition at p. 12. But the ordinance here provides no guidance for avoiding a police order to disperse in the first place. Instead, as the Illinois Supreme Court held, the decision whether certain persons are loitering in the presence of a gangmember is left to the standardless discretion of a police officer. Petition Appendix at pp. 13a-15a. The City's Petition focuses on the notice prong of the vagueness doctrine and fails to acknowledge that the Illinois Supreme Court also found that the Ordinance as written - and as applied to respondents who were convicted - encouraged arbitrary and discriminatory enforcement. Petition Appendix at pp. 14a-17a.

The City's Petition exhibits a fundamental misunderstanding of criminal law when it argues that an officer's reasonable belief that a loiterer is a gangmember saves its ordinance from vagueness because "all criminal statutes are enforced based on the arresting officer's belief that reasonable suspicion or probable cause exists." Petition at p. 13. However, other criminal statutes including loitering laws do not elevate an officer's reasonable suspicion or probable cause into an element of the offense as the City's ordinance purports to do. The Ordinance here allows for a person to be convicted - not merely stopped or arrested - based solely on a reasonable belief rather than proof beyond a reasonable doubt that the loitering is done in association with a gangmember. See e.g. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (essential elements of criminal offense must be proven beyond a reasonable doubt); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Moreover, the City misapplies the notion of probable cause by divorcing it from the requirement of criminal activity. It is black letter law that reasonable suspicion for a Terry stop or probable cause for arrest must stem from particularized and objective facts indicating that a suspect has committed or is about to commit a crime. See e.g. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Here, the Ordinance requires only that a police officer have a reasonable belief about a person's association with a gang, which cannot by itself constitute criminal activity. See e.g. Dawson v. Delaware, 503

U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992). "Probable cause" with respect to identity or association is not constitutionally sufficient probable cause that a person is involved in criminal activity. See e.g. Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917 (1968).

With respect to substantive due process, the City's Petition devotes considerable space to arguing points not reached below. Petition at pp. 18-20. In its opinion, the Illinois Supreme Court expressly stated that its ruling on substantive due process did not reach questions of the right of expressive or intimate association. Petition Appendix at p. 19a. Instead, the Illinois Supreme Court found the City's ordinance to be unconstitutional under lesser scrutiny because it arbitrarily intruded on personal liberties including the general rights to travel and to associate with others. Petition Appendix at 18a.

Without citation of any authority, the City hypothesizes that "loitering is the antithesis of travel" and that its ordinance does not unreasonably burden that right so long as citizens "keep on walking." Petition at p. 20. One does not have to look further than the facts in the record about the City's enforcement of this provision for a demonstration of the ordinance's inherent arbitrariness and unreasonableness. Respondent Jesus Morales was convicted of gang loitering after he paused while walking home from the hospital on crutches. (Morales, R. 17-18, 19-21). Notably, despite its protestations about the right of association, the City also prosecuted and

convicted Respondent Gregorio Gutierrez for his loitering in association with his own brother. (Gutierrez, R. 24-25, 28); Petition at pp. 18-19.

Pointing to the history and tradition of loitering laws, the City argues that there is no constitutional basis for invalidating prophylactic laws enacted after legislative cost/benefit balancing. Petition at p. 20-21. The City also expresses its desire to dispense with the requirement of proof of criminal activity beyond a reasonable doubt. Petition at p. 24. However, as numerous courts have recognized, loitering laws have an equally long history of abuse. Petition Appendix at pp. 8a. Labelling a criminal statute as a "prophylaxis" cannot evade the attendant constitutional requirements including proof beyond a reasonable doubt and language that clear enough to define prohibited conduct and confine the exercise of discretion. Petition at pp. 20-21.

Because the decision of the Illinois Supreme Court addressing the particular structure and language of this ordinance was correct in finding it to be wanting on grounds of void-for-vagueness and arbitrariness, no further review is necessary.

In short, the City's Petition has advanced no grounds to warrant review. The Illinois Supreme Court's decision rested on adequate and independent state grounds and the Illinois Appellate Court found the Ordinance to be unconstitutional for at least three additional flaws. There is no conflict in the

lower courts relevant to the particular language of this ordinance. The demise of this ill-drafted ordinance will have no impact beyond the litigants as the means of appropriate regulation of loitering is well-established in other case law. Finally, the decision itself is correct on the merits.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 97-1121

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CITY OF CHICAGO,
Petitioner,
v.
JESUS MORALES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

In an effort to dismiss our submission that there is disagreement in the lower courts over the standard to be applied to loitering and other public order laws, respondents correctly observe that no court has ever considered an ordinance containing precisely the same language found in Chicago's gang loitering ordinance. Of course, the three amicus briefs filed in support of the petition, signed by nearly 20 entities with a focus considerably broader than the workings of the City of Chicago, bear witness to the widespread concern about the decision below. Moreover, respondents cannot fairly dispute that there is a serious disagreement in the lower courts about what standards should be applied to public order laws, and in particular about whether an enactment violates the Due Process Clause merely because it "makes criminal activities which by modern standards are normally innocent." Pet. App.

9a (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972)). It is because of this disagreement—and the considerable uncertainty it has engendered in this area of the law—that this case warrants this Court's review.

1. The Morales respondents claim that this Court lacks jurisdiction here "because the decision of the Illinois Supreme Court rested on adequate and independent state grounds." Morales Br. 9. The Morales respondents do not even attempt to square their position with *Michigan v. Long*, 463 U.S. 1032 (1983), and its progeny. *Michigan v. Long* announced a simple rule: when the decision of a state court rests "primarily" on or is "interwoven" with federal law, this Court may exercise jurisdiction unless the opinion of the state court contains a "plain statement" that "clearly and expressly" indicates that its judgment rests on an adequate and independent state ground. *Id.* at 1041. This is true even when a state court relies on state precedents to support its holding, as long as at least "some of those cases relied on an analysis of our cases . . . ." *Pennsylvania v. Labron*, 116 S. Ct. 2485, 2487 (1996) (per curiam). This Court has consistently applied this plain statement rule since it decided *Long*. See Pet. 2 n.1.

The Illinois Supreme Court expressly invoked federal law—and relied primarily on this Court's decisions—in invalidating the gang loitering ordinance. See, *e.g.*, Pet. App. 7a, 17a. There is no plain statement in the opinion below that the court's judgment rests on an adequate and independent state ground. Under *Michigan v. Long*, that is the end of the jurisdictional inquiry. Indeed the holding in *Long* was meant to end precisely the sort of jurisdictional complexity that the Morales respondents urge, which requires this Court to parse the opinion below and search through applicable state law in order to divine whether it, uninfluenced by federal principles, could support the judgment below. See 463 U.S. at 1039-41.[1] It is perhaps for this reason that the Youkhana respondents do not join in this jurisdictional objection.

The Morales respondents' position is all the more unfounded since, in their brief below, respondents brought the holding of *Long* to the court's attention and asked it to make an express statement that any judgment invalidating the gang loitering ordinance rested on an adequate and independent state ground. See Brief of Defendants-Appellees at 9-10 & n.1, *City of Chicago v. Morales*, Nos. 80497, 80485 & 80668 (Ill. Sup. Ct.). The court, however, declined respondents' invitation. Had the state court wished to insulate its judgment from this Court's review, it knew just what to do. Plainly the Illinois Supreme Court intended that this Court be able to correct any error it may have made in assessing applicable federal standards for public order laws.

2. As to the disarray we detail in the lower courts over the standards governing loitering and similar public order laws (see Pet. 14-17), respondents claim that this dis-

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[1] While the Morales respondents ignore *Michigan v. Long*, they do cite *California v. Freeman*, 488 U.S. 1311 (1989), for the proposition that a state court's "decision that [the] defendant's conduct was not within [the] statutory definition of crime furnished [an] adequate and independent state ground for reversing [a] conviction." Morales Br. 9. The Morales respondents do not explain how that proposition reaches this case. Nothing in the Illinois Supreme Court's opinion even hints that respondents were not properly charged or convicted. To the contrary, rather than hold that the defendants before it either were not properly charged with a crime, as the court did in *People v. Nash*, 173 Ill. 2d 423, 672 N.E.2d 1166 (1996), another case the Morales respondents cite, or that any of the respondents had not in fact been proven guilty of violating the gang loitering ordinance, the Illinois Supreme Court squarely held that the gang loitering ordinance "fails to meet constitutional standards for definiteness and clarity" (Pet. App. 17a) and that it "is an arbitrary restriction on personal liberty and, thus, violates substantive due process" (*id.* at 19a).

agreement extends only to ordinances significantly different from ours, and that there is unanimity on the invalidity of ordinances penalizing "mere loitering." See Morales Br. 11; Youkhana Br. 15. Of course, as the Illinois Supreme Court recognized, this ordinance requires more than "mere" loitering; it also requires that the police reasonably believe that a group loitering contain a member of a criminal street gang and disobedience to a police order to move on. *See* Pet. App. 11a-14a. More important, the conflict in the lower courts is not about "mere loitering"; not a single case either side has cited involves a prohibition on loitering without more. Rather, the question on which the lower courts have disagreed is whether a loitering law is invalid if "it fails to distinguish between innocent conduct and conduct calculated to cause harm and 'makes criminal activities which by modern standards are normally innocent.'" Pet. App. 9a (citation omitted) (quoting *Papachristou*, 405 U.S. at 163)). In our view, of course, this proposition is inconsistent with the unquestioned power of legislatures to enact prophylactic laws that criminalize conduct that may be innocent in itself, but which is unacceptably likely to give rise to substantive evils within the power of government to prohibit.

There is a square conflict on this point and it lies at the heart of this case as well. Here, the Illinois Supreme Court found Chicago's ordinance to be impermissibly vague and inconsistent with substantive due process because it could be applied to persons engaged in "innocent" activities. See Pet. App. 10a, 17a-18a. Other courts have also invalidated loitering ordinances for this same reason. See, *e.g.*, *People v. C.M.*, 630 P.2d 593, 595-96 (Colo. 1981) (school loitering ordinance invalid because it could reach nondisruptive persons); *City of Akron v. Rowland*, 67 Ohio St. 3d 374, 382-83, 618 N.E.2d 138, 145-46 (1993) (drug loitering statute invalid because it could reach persons innocently standing on streets). But still other courts have rejected this argument, concluding that

as long as an ordinance requires additional conduct that distinguishes an offender from persons who are merely loitering, it should be upheld even if police will occasionally be mistaken about why an individual is loitering. See, *e.g.*, *Bell v. State*, 252 Ga. 267, 271, 313 S.E.2d 678, 681 (1984) (state statute did not reach all loiterers because "the conduct must be that which would alarm a reasonable person that danger exists to person or property"); *People v. Smith*, 44 N.Y.2d 613, 619-20, 378 N.E.2d 1032, 1035, 407 N.Y.S.2d 462, 465-66 (1978) (state statute upheld because "it requires loitering plus additional objective conduct evincing that the observed activities are for the purpose of prostitution").

If the former view is correct, then so was the decision below. We agree that our ordinance can be applied to gang members and their cohorts even when they are not loitering for the purpose of facilitating criminal street gang activity. If the latter view is correct, however, the gang loitering ordinance readily passes constitutional muster. It does not apply to all loiterers, but only to groups containing persons reasonably believed to be members of criminal street gangs, and even then only if they disobey an order to move on. Thus the disagreement in the lower courts over whether a law's potential to reach nondisruptive loiterers is reason to invalidate it is central to the constitutionality of the gang loitering ordinance.

The Youkhana respondents claim that the varying results that the lower courts have reached on loitering laws can actually be reconciled (an assertion evidently too bold for the Morales respondents to join). See Youkhana Br. 15-16. In fact, the decisions in this area are plainly irreconcilable. We explain at some length in our petition why this is so; for present purposes a few examples should suffice. In *City of Milwaukee v. Nelson*, 149 Wis. 2d 434, 439 N.W.2d 562, cert. denied, 493 U.S. 824 (1989), the court detailed the split in authority among courts to consider loitering laws modeled on the Model Penal Code,

which recommends a prohibition on loitering under circumstances that reasonably warrant alarm for the safety of persons or property (see American Law Institute, *Model Penal Code* § 250.6 (1985)), and found "the reasoning of the courts who have approved the Model Penal Code to be more persuasive." 149 Wis. 2d at 445, 439 N.W.2d at 566. Our ordinance, of course, is simply a more precise version of the Model Penal Code model, since it specifies the particular circumstance in which the legislature found that loitering reasonably warrants alarm. As for another popular approach, *City of Akron v. Rowland* invalidated (by 4-3 vote) an ordinance prohibiting loitering for the purpose of engaging in drug-related activity virtually identical to the law upheld in *City of Tacoma v. Luvene*, 118 Wash. 2d 826, 837 P.2d 1374 (1992).[2] The varying results courts have reached on laws prohibiting loitering with criminal intent are also detailed at some length in *People v. Superior Court*, 46 Cal. 4th 381, 398-400, 758 P.2d 1046, 1055-56, 250 Cal. Rptr. 515, 524-25 (1988).[3]

Particularly revealing is the Morales respondents' claim that Chicago need only enact a different type of loitering ordinance to reap the benefits of the proactive and prophylactic law enforcement strategy that such laws facili-

[2] And after our petition was filed, the Louisiana Supreme Court invalidated that state's drug loitering statute, expressly rejecting *Luvene* and following *Rowland*. See *State v. Muschkat*, 1998 WL 91793 (La. March 4, 1998).

[3] Also unpersuasive is respondents' effort to distinguish the holding that an injunction against gang members loitering in public infringed no constitutionally protected interest in *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 929 P.2d 596, 60 Cal. Rptr. 2d 277, cert. denied *sub nom. Gonzalez v. Gallo*, 117 S. Ct. 2513 (1997), on the ground that the case involved an injunction rather than a generally applicable law. See Morales Br. 11-12; Youkhana Br. 19-20. In fact, injunctions generally call for more rigorous judicial review than generally applicable laws. See *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 764-67 (1994).

tate. See Morales Br. 12-13. In fact, there is no type of loitering or similar ordinance that a state or local government may safely enact. As we explain above and at greater length in our petition, courts have disagreed about the validity of laws modeled on the Model Penal Code, laws requiring loitering with intent to engage in unlawful activity, and even laws forbidding sleeping on the public ways.[4] In her comprehensive review of public order laws, Professor Livingston demonstrates that there is no type of public order law that has received uniform judicial treatment, largely because of the uncertain reach of this Court's holding in *Papachristou*. See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 Colum. L. Rev. 551, 608-34 (1997). Thus it is no wonder that she found the law in this area to be "erratic, fractured, and confusing . . . ." *Id.* at 628.

3. On the vagueness holding below, only the Youkhana respondents attempt to defend the Illinois Supreme Court's approach to the first prong of vagueness doctrine, which "requires a criminal statute to be sufficiently defined so it provides persons of ordinary intelligence adequate notice of proscribed conduct." Pet. App. 7a (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). They claim that the term "loitering" "is so amorphous that people of ordinary intelligence cannot understand what it prohibits or how to comply with its requirement." Youkhana Br. 6. If this were the case, however, any law that made "loitering" an element of a criminal offense would be invalid because no one could know when they were loitering; yet even respondents do not suggest that all loitering laws are invalid. In fact, courts have frequently held that "loitering" has a common sense meaning that reasonable persons can apprehend. See, *e.g.*, *People v. Superior Court*, 46 Cal. 4th at 390-92, 758 P.2d at 1049-50, 250 Cal. Rptr.

[4] Even juvenile curfew laws provide no safe harbor from attack under the rationale employed below, as the Youkhana respondents note. See Youkhana Br. 18.

at 518-19; *State v. Armstrong*, 282 Minn. 39, 42, 162 N.W.2d 357, 360 (1968).

Even more important, since the only conduct proscribed by the gang loitering ordinance is disobedience to a police order to move on, the ordinance provides unmistakable notice of what is forbidden. Whatever else might be said about a law requiring persons to obey all police orders, it is surely not vague.[5] Under such a law, persons know exactly what is expected of them. The same is true under the gang loitering ordinance.

The second prong of vagueness doctrine is "the requirement that a penal statute must adequately define a criminal offense in such a manner that does not encourage arbitrary and discriminatory enforcement." Pet. App. 14a (citing *Kolender*, 461 U.S. at 357-58). Respondents claim that the ordinance confers "standardless" (Morales Br. 13) or "unfettered" (Youkhana Br. 13) discretion on police officers to order persons to move on. The ordinance, however, requires that police officers have a reasonable belief that a group of loiterers contains a member of a criminal street gang. Respondents do not explain how this is any more "standardless" than the "reasonable suspicion" standard of *Terry v. Ohio*, 392 U.S. 1 (1968), which the Court explained could properly be used as a basis to detain loiterers in *Kolender* because it provides "neutral limitations on the conduct of individual officers." 461 U.S. at 361 (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)). And if "reasonable suspicion" is an appropriately "neutral" limitation on an officer's authority to detain loiterers, we fail to see why an officer's "reasonable belief" is not an equally "neutral" limitation on the power to order loiterers

[5] A law granting the police unfettered discretion to order persons around, of course, would fail under the second prong of vagueness doctrine because it would permit arbitrary and discriminatory enforcement. That is the only point made by the dicta in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-91 & n.5 (1965), on which the Youkhana respondents so heavily rely. See Youkhana Br. 7.

to move on. In fact, requiring loiterers to move on is surely a lesser infringement on their liberty than authorizing their detention.

The Morales respondents add that our ordinance is arbitrary and discriminatory because it imposes sanctions triggered by an individual's association with a criminal street gang. See Morales Br. 14-15. In fact, government may make an individual's status an element of a criminal offense when it has a reasonable basis for doing so, even if it could not constitutionally impose punishment based on status alone. No case makes this clearer than *Lewis v. United States*, 445 U.S. 55 (1980), in which the Court upheld a statute prohibiting all convicted felons from possessing firearms, even if their convictions were uncounseled and hence unconstitutionally obtained, since there was a rational basis to deny all convicted persons access to firearms. See *id.* at 65-68. Here, even respondents do not dispute that the legislature had a rational basis to believe that loitering by groups containing criminal street gang members posed special dangers. Requiring such groups to move along when ordered is anything but arbitrary and discriminatory—in light of the City Council's findings it was plainly rational to limit this group's freedom to loiter, just as "Congress' judgment that a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness was rational." *Id.* at 67 (footnote omitted).

4. Defending the substantive due process holding of the Illinois Supreme Court, respondents do not claim that the gang loitering ordinance infringes any fundamental right and therefore requires strict judicial scrutiny, but rather concede that it requires only a rational basis. See Morales Br. 15-16; Youkhana Br. 17. Surely the legislature could rationally conclude that this modest infringement of liberty interests accomplished by requiring loiterers to obey police orders to move on is justified by the need to combat the

evils engendered by gang loitering—an interest respondents notably do not claim to be illegitimate. And if the legislature's judgment was at least rational, we do not see why the rubric of substantive due process grants courts authority to overturn it.

5. Even respondents do not question that the tide has properly turned in favor of proactive and community-oriented policing strategies including public order laws, nor do they deny that the threat of liability created by the unsettled state of the law poses potent inhibitions to state and local governments considering such laws. Decreasing the uncertainty now rife in this area of the law is surely reason enough to grant plenary review. Upholding this ordinance because it prohibits disobedience to a police order given under a "reasonable belief" standard derived from *Terry* would provide state and local governments with urgently needed guidance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 97-1121

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

City of Chicago,

Petitioner,

v.

Jesus Morales, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF OHIO, CALIFORNIA, ILLINOIS, KANSAS, LOUISIANA, MICHIGAN, MISSISSIPPI, NEBRASKA, NEVADA, SOUTH CAROLINA, SOUTH DAKOTA AND THE COMMONWEALTHS OF PENNSYLVANIA AND VIRGINIA IN SUPPORT OF THE PETITION

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STATEMENT OF *AMICI* INTEREST

The State of Ohio, together with twelve other *amici* States, join the City of Chicago in urging the Court to review the decision of the Supreme Court of Illinois. Because the *amici* States share the City's concerns about the urban crime, violence and disruption of community life that criminal gangs continue to spawn throughout the country and because they share with their political subdivisions the essential lawmaking responsibility for rooting out these problems, they agree that the Court should clarify the permissible scope of police power that the Constitution tolerates in this important area.

The problems that youth gangs have brought to local communities are new in kind, and indeed would have surprised most prior generations of American adults. A 1995 survey of over 4000 local law enforcement agencies confirms the pervasive scope of youth gang influence in modern America: It shows the existence of gang activity in all fifty states; it demonstrates a gang presence in rural as well as urban counties; and it shows a total of 23,388 youth gangs and a total of 664,906 gang members. *See* 1995 National Youth Gang Survey, published by the Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice, p. xi. The overwhelming majority of law enforcement agencies report that gang problems in recent years either have stayed the same or are getting worse, with almost half reporting worse. *Id.* The National Institute of Justice reports similar statistics. In 1993, when there were 16,643 gangs with 555,181 members, the Institute projected 580,331 gang crime incidents nationwide. D. Curry et al., *Estimating the National Scope of Gang Crime from Law Enforcement Data* (Nat'l Institute of Justice, Aug. 1996), at 3-4. The volume of such crimes, the Institute estimated, grew from eight to 11 times the number that existed in 1991. *Id.*

To their credit, State and local governments have attempted to respond to these disturbing developments through a number of different strategies. At the State level, for example,

Ohio has proposed legislation that makes it a second degree felony to "actively participate" in a criminal gang and to promote or assist in the commission of specified crimes. The pending legislation in Ohio follows the lead of California's "STEP" legislation ("street terrorism enforcement and prevention"), first enacted in 1988 and amended several times since then. Cal. Penal Code §§186.20, 186.21 (legislative findings), 186.22(a) (prohibiting active participation plus promoting or assisting with predicate offenses), 186.22(c), (f) (definitions), 186.26 (offense of coercing a minor to participate in a gang), 186.28 (offense of supplying firearms to gang) (West Supp. 1998).

In like manner, several other States either criminalize gang participation or enhance penalities based on the gang-related nature of a criminal act. *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 13-105 (definitions), 13-2308(G) (class 2 felony offense of criminal gang participation) (West Supp. 1997); Ark. Code Ann. §§ 5-74-102 (legislative findings), 5-74-103 (definitions), 5-74-104 (defining first and second degree gang participation offenses), 5-74-203 (gang recruitment offenses), 5-74-105 (offense of using another's property for gang activity), 5-74-107 (unlawful discharging of firearms from vehicle) 5-74-108 (enhancement of penalties acting in concert), 5-74-201 (findings), 5-74-202 (definitions), 5-74-203 (offense of soliciting gang membership) (Michie 1997); Fla. Stat. ch. 874.02 (legislative findings), 874.03 (definitions), 874.04 (enhancement of felonies committed as part of pattern of gang activity) (1993); Ga. Code Ann. §§ 16-15-2 (legislative findings), 16-15-3 (definitions), 16-15-4 (enhancement of gang-related misconduct) (Michie 1996); Ind. Code §§ 35-45-9-1, 2 (definitions), 35-45-9-3 (gang participation offense), 35-45-9-4 (compelling membership in gang) (1993); 720 Ill. Comp. Stat. Ann. 570/405.2 (offense of street criminal drug conspiracy) (West Supp. 1997); Iowa Code Ann. §§ 723A.1 (definitions), 723A.2 (gang participation offense) (West 1993 & Supp. 1997);

Kan. Stat. Ann. § 21-4704(k) (sentencing guidelines presume imprisonment for gang offense) (Supp. 1996); La. Rev. Stat. Ann. §§ 15:1402 (legislative findings), 15:1403 (gang participation offense), 15:1404 (definitions) (West 1992 & Supp. 1998); Mass. Gen. Laws Ann. ch. 265, § 44 (offense of coercing minor to join gang) (West Supp. 1997); Minn. Stat. § 609.229 subd. (1) (definitions), subd. (2) (participation offense) (1992 & Supp. 1993); Mo. Ann. Stat. §§ 578.421 (definitions), 578.423 (participation offense), 578.425 (enhancements), 578.435 (offense of possessing weapons for gang crime) (West 1995); Mont. Code Ann. §§ 45-8-402, 405 (definitions), 45-8-403 (offense of coercing membership), 45-8-404 (enhancement of sentence for gang-related felony), 45-8-406 (offense of supplying firearms to gang) (1997); Nev. Rev. Stat. § 193.168 (doubling prison term for gang-related crime) (1997); Okla. Stat. Ann. §§ 21-856 (offense of willfully recruiting minor into gang) (West Supp. 1998); S.D. Codified Laws §§ 22-10-14 (definitions), 22-10-15 (enhancements) (Michie Supp. 1997); Tex. Penal Code Ann. §§71-01(d) (definition), 71-02 (participation offense) (West Supp. 1998). Alaska also uses gang-participation as an element in some crimes. Second degree murder, for instance, occurs when the individual causes the death of a non-participant while committing or attempting to commit a felony. *See* Alaska Stat. §11.41.110(4) (Michie 1996). The State also makes gang participation an aggravating factor in sentencing, §12.55.155(28), and outlaws gang recruitment, §11.61.160, 165 (Michie 1996).

The Chicago ordinance follows a similar path in trying to inhibit gang violence and maintain public order. Based on extensive testimony before the City Council, the ordinance tries carefully to strike at the following evils: the intimidation of law-abiding residents by gang loitering; and the creation of a context and cover for gang criminal activities as well as a method of recruitment. The Illinois Supreme Court did not appear to doubt any of this. Yet under its holding society's power to

defend itself against these acknowledged evils was sharply curtailed. It would seem to be an essential function of State and local government to determine the proper balance between rights and regulations concerning access to and enjoyment of a community's streets, above all to ensure equal access to this basic component of urban life. Because the *amici* States need the legislative tools to engage in criminal gang control and community policing, they respectfully submit that the Court should grant review of the decision of the Illinois Supreme Court to clarify this essential area of the law.

REASONS FOR GRANTING THE WRIT

At the same time the Illinois Supreme Court recognized that "[c]riminal street gangs are an expanding cancer in our society and their illegal activities endanger the safety of many law-abiding citizens," Pet. App. 17a, the court struck a debilitating blow to the reasonable efforts of State and local governments to abate youth gang crime. The problem with the decision is not that it contradicts *dicta* in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). It is precisely that broad *dicta* in *Papachristou* would seem to sanction not just the lower-court decision but virtually any other decision that invalidates sensible lawmaking efforts like these. *See* Pet. App. 9a (citing Papachristou for the proposition that a law is infirm if it "makes criminal" activities which "by modern standards are normally innocent"); *id.* 17a ("The Court observed [in *Papachristou*] that such activities [loafing, loitering and nightwalking] are amenities of American life").

The breadth of the *Papachristou dicta* not only overprotects criminal gangs but also underprotects other members of urban communities. If walking the streets or even sauntering about them are constitutional "amenities of American life," for example, *Papachristou*, 405 U.S. at 164, then surely they are amenities to be enjoyed by all American citizens.

When a city like Chicago thus determines that brazen, intimidating, even coercive, members of its community are infringing the enjoyment of these amenities by all citizens, it ought to have the police power to ensure that the allocation of these amenities is fairly distributed. Current law, however, makes that very difficult.

A. The Deliberate Nature Of Chicago's Efforts To Regulate Criminal Gang Loitering Contrasts Markedly With The Anachronistic Jacksonville Ordinance Invalidated In *Papachristou*.

As an initial matter, it is important to emphasize the differences between the Chicago ordinance and the Jacksonville (and State-law) provisions invalidated by *Papachristou* 26 years ago. The *Papachristou* ordinances addressed a problem whose time had come and gone. As a brief review of the provisions confirms, *see Papachristou*, 405 U.S. at 158, "Jacksonville's ordinance and Florida's statute were derived from early English law, and employ[ed] archaic language in their definitions of vagrants," *id.* at 161 (quotation omitted). Even though "the theory of the Elizabethan poor laws" that perpetuated and harshened these laws "no longer fits the facts," and even though the "conditions which spawned these laws may be gone," the "archaic classifications remain[ed]" in Florida in the early 1970's. *Id.* at 161-62 (quotations omitted).

In conspicuous contrast to the *Papachristou* laws, which after years of innocuous desuetude were suddenly enforced in Florida, the Chicago ordinance takes aim at a distinctly modern problem with a fresh set of legislative facts to support it. As the Illinois Supreme Court recognized, the ordinance represents the culmination of significant study and consideration. It starts out (Pet. 60a) by identifying the policy judgments that prompted the law -- an increasing murder rate as well as an increase in violent

and drug-related crimes, an assessment that criminal street gang activity bears a substantial responsibility for the problem, and the use of loitering by criminal gangs to maintain control over identifiable areas and to intimidate others from using those areas. The ordinance then proceeds to define "criminal street gang" as

> any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more . . . enumerated [criminal acts], and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

Pet. 61a- 62a. A "pattern of criminal gang activity" in turn means "two or more acts of criminal gang activity of which at least two such acts were committed within five years of each other." *Id.* at 63a.

Unlike the *Papachristou* ordinances, the Chicago law regulates a current and serious problem, and does so on the basis of up-to-date legislative findings. The provision also uses familiar definitions of crime. The definition of a "pattern of criminal gang activity," for instance, parallels the familiar concepts of "enterprise" and "pattern of racketeering activity" found in federal and state RICO legislation. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *United States v. Turkette*, 452 U.S. 576, 578-79 (1980). This of course helps to distinguish the law from other cases as well. *See Lanzetta v. New Jersey*, 306 U.S. 451, 453-54 (1939) (finding law vague because it defined "gang" to mean simply "two or more persons" without also defining impermissible gang conduct).

In further contrast to the *Papachristou* laws, Chicago's delegation of authority to disperse loiterers based on an officer's objective determination that one of them is likely to be a criminal gang member represents an innovation in community policing. It is typical of other urban inititiatives designed to abate youth gang street crime by moving away from a crime-solving model of law enforcement to a preventive, community-policing model. The new approach rests upon the insight that by declining to tolerate mild levels of public disorder, cities can avoid the all-too-familiar spiral into more severe disorder, crime and community dysfunction. *See* D. Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L.Rev. 551, 581-82 (1997) (citing empirical research supporting the "broken windows" thesis -- that unremediated disorder leads to greater disorder). While this model plainly offers a fresh approach to urban crime, it also coincides with the concern of residents in many urban communities that "passivity in the face of outrageous street behavior" constitutes a critical law-enforcement shortcoming. G. Kelling & C. Coles, *Disorder and the Court*, 116 Pub. Interest 57, 70 (1994).

Nor is the new Chicago ordinance the first one to fall victim to the broad *dicta* in *Papachristou*. In 1989, the District of Columbia passed an "illegal drug zone" ordinance, 36 D.C. Reg. 2835, authorizing the Chief of Police to disperse persons who congregate within the specially-designated zones for up to five days. The D.C. Superior Court invalidated the law on vagueness and overbreadth grounds. *See United States v. Kennedy*, 118 Daily Wash. L. Rep. 873 (Jan. 12, 1990). Unlike the present law, the D.C. ordinance potentially subjected any assemblage to dispersal within the zone (even a First Amendment activity), and failed to give the police any express standard as to which congregations of people should be dispersed and which should not be. Like the lower court here, however, the D.C. court invoked broad language from

Papachristou, stating that "the freedom to be with intimate relations and close friends in public places would seem as fundamental as the liberty of the individual simply to walk or loiter in those places, which the Supreme Court in *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163-65 (1972) found protected by substantive due process." 118 Daily Wash. L. Rep. at 877.

B. The Chicago Ordinance Is Not Unconstitutionally Vague.

The Chicago ordinance does not violate the Constitution's prohibition against vague criminal laws. In particular, it steers clear of the two flaws that characterize such laws: They fail either to "provid[e] fair warning" of what is prohibited or to "provide explicit standards" to limit the discretion of those who enforce the law. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Neither defect applies here. In plain terms, the ordinance (1) authorizes the police to issue a dispersal order when they reasonably believe that one or more loiterers is a criminal gang member; (2) gives additional notice to all persons covered by the law when they are told to disperse; and (3) sanctions only those who disobey the police orders.

Chicago, then, chose not to regulate loitering in and of itself, but only to regulate it when combined with criminal gang activity and when police orders to disperse are ignored. These features of the law bring it well within the parameter of other laws the Court has upheld. *See, e.g., Grayned*, 408 U.S. at 113 (1972) (upholding conviction for creating noise near school where police discretion was cabined by required showing of interference with school activities); *Colten v. Kentucky*, 407 U.S. 104, 108-09 (1972) (upholding conviction under disorderly conduct statute that required compliance with dispersal order

and that required intent to cause public inconvenience). *Cf. Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965) (upholding disobedience-to-police-order law when coupled with element of sidewalk blockage).

Instead of stopping here and relying on this authority, however, the lower court proceeded. It took the view that these features of the law did not suffice to save it, even when combined with an order of dispersal and a careful definition of criminal gang activity, because the individual "has no way of knowing whether an approaching police officer has a reasonable belief that the group contains a member of a criminal gang." Pet. 11a-12a. In the lower court's view, in other words, the validity of requiring compliance with police orders turns on whether the individuals subject to the order themselves perceive an objective basis for the order, not whether the officers have an objectively reasonable basis for issuing the order. No doubt other courts have voiced similar sentiments. *See, e.g., City of Akron v. Rowland*, 618 N.E. 2d 138, 145 (Ohio 1993) (drug loitering ordinance held invalid where, "without being able to read the officers' minds," a suspect could not ascertain the reasonableness of police suspicion). But these views cannot be squared with traditional methods for balancing a community's collective interests in security against the individual's interest in liberty.

Left unreviewed, this position also threatens to upset time-honored understandings of the legitimate authority of the police to investigate, ferret out and stop crime. The Fourth Amendment has long used "reasonable suspicion" and "probable cause" as objective touchstones for determining when government may interfere with individual liberty. *See Terry v. Ohio*, 392 U.S. 1, 20-22 (1968) (discussing probable cause and reasonable suspicion standards as the basis for "assur[ing] that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of

a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances"). Indeed, the Fourth Amendment itself refers just to "unreasonable searches and seizures," and has never assessed compliance with the standard from the perspective of the *individual's*, as opposed to the officer's, objective determination of whether cause exists to request an accounting of the individual's conduct.

Case law proves the point. The Court has frequently examined the objective reasonableness of law-enforcement action from the standpoint of the officer involved, not the individual suspected of crime. *See Ornelas v. United States*, 116 S.Ct. 1657, 1661-62 (1996) ("components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether those historical facts, *viewed from the standpoint of an objectively reasonable police officer*, amount to reasonable suspicion or to probable cause"); *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968) (standard for reviewing Fourth Amendment reasonableness is "would the *facts available to the officer* at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate") (internal quotation omitted). Under the *Terry*-stop rule, as a result, police may briefly detain an individual on "reasonable suspicion" that crime is afoot even though probable cause does not yet exist. In the words of Justice Brennan: "The *Terry* doctrine permits police officers . . . [i]f *they have the requisite reasonable suspicion* . . . [to] use a number of devices with substantial coercive impact on the person to whom they direct their attention, including an official 'show of authority,' the use of physical force to restrain him, and a search of the person for weapons." *Kolender v. Lawson*, 461 U.S. 352, 364 (1983) (Brennan, J., concurring). As these cases illustrate, the

authority of law enforcement to intrude upon an individual's liberty simply does not turn on the suspect's insight into the reasonableness of the officer's action.

In addition generally to looking at these requirements from the perspective of the law-enforcement officer, the Court's search-and-seizure decisions also have applied these reasonableness principles specifically to similar types of law-enforcement action. Just as Chicago authorizes an officer to stop "a person whom he reasonably believes to be a criminal street gang member," 8-4-015(a), so too federal drug enforcement agents frequently stop travelers in an airport who fit the profile of a drug courier. In the drug interdiction context, the Court has frequently permitted such detentions (which, it is worth adding, pose far more risk of arrest and loss of liberty than an order to disperse). *See United States v. Sokolow*, 490 U.S. [illegible] (1989); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985). Roadside stops also may be justified by particularized, articulable suspicion of drug trafficking. *See, e.g., United States v. Sharpe*, 470 U.S. 675 (1985). Even without reasonable suspicion, the Court has permitted random drug testing and random roadside stops to end drunk driving. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Michigan Dept. Of State Police v. Sitz*, 496 U.S. 444 (1989).

Surely, in the light of these precedents, Chicago does not offend the Constitution when it authorizes officers to impose a *de minimis* restriction on individual liberty with a far greater explanation for doing so than these Fourth Amendment decisions require. Here, officers observed a group of persons loitering in a public place. They formed a "reasonable belief" that the individuals belonged to a criminal gang. They asked them to disperse. Then and only then did the officers arrest anybody, and even then only for failing to do what all citizens in a civil society customarily have been expected to do -- obey the

police. *See Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) ("[c]ivil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses"); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) (maintaining public order protects liberty itself from being "lost in the excesses of anarchy").

As in the Court's drug-profile cases, moreover, the general police order implementing the Chicago ordinance illustrates a city policy ensuring that trained officers will perform this function, Pet. App. 65a, and sets forth identifiably objective criteria for determining gang membership, Pet. App. 67a-68a. *See also Sokolow*, 490 U.S. at 10. In the end, it would seem anomalous if the vagueness limitation of the due process clause of the Fourteenth Amendment prohibited what the search-and-seizure requirement of the same clause positively permits.

No such anomaly, however, exists. Contrary to the lower-court's decision, similar rules have governed vagueness and overbreadth challenges. *See Boos v. Barry*, 485 U.S. 312, 331-32 (1988) (rejecting vagueness challenge to ordinance limiting demonstrations at embassies because it was interpreted to permit dispersal "only when the *police reasonably believe* that a threat to the security or peace of the embassy is present"); *Grayned*, 408 U.S. at 114 (acknowledging that enforcing ordinance prohibiting noisy interference with school activity "requires the exercise of some degree of *police judgment*, but, as confined, that degree of judgment here is permissible"); *Colten*, 407 U.S. at 109 (upholding conviction for disorderly refusal to obey dispersal order where "police had cause for apprehension . . . [of] the risk of accident").

All things considered, the Chicago ordinance advances the group goals of security without infringing on individual constitutional rights. In many respects, the legality of this

ordinance poses a far less severe risk to liberty than the customary right of officers to detain individuals reasonably suspected of crime. Notably, Chicago does not authorize a detention based upon loitering with a gang member, but only upon refusal to obey the dispersal order. Far from requiring detention, the police officer's order assumes detention will be avoided when the individual complies with the order. Accordingly, while the Chicago ordinance contemplates that the individual will exercise his or her freedom to walk away, a Fourth Amendment seizure contemplates that the police will "restrain[] his freedom to walk away," *Terry*, 392 U.S. at 16. At most, in other words, the dispersal order intrudes upon a generalized privilege of casual association in public places -- a privilege that receives no special constitutional protection under *City of Dallas v. Stanglin*, 490 U.S. 19 (1989). The lower-court's contrary position should be reviewed and reversed.

C. The Chicago Ordinance Does Not Violate Substantive Due Process.

In addition to misjudging vagueness law, the lower court erred in striking the law in all of its applications (*i.e.*, facially) on substantive due process grounds. While the court properly recognized that the law was subject to rational-basis review and could be invalidated only if it "intrude[s] upon personal liberties arbitrarily or in an utterly unreasonable manner," Pet. 18a, it nonetheless found the law unconstitutional. This, too, was error, and ought to be reviewed.

It is difficult to see how the Chicago ordinance falls short of meeting the modest requirement of rational lawmaking. While the laws at issue in *Papachristou* may not have contained a rational means-end fit, Pet. 18a-19a, this law certainly does. It takes on the acute problems of youth gang crime by carefully regulating criminal gang loitering in the urban setting. Three specific harms form the basis for the law:

- **Intimidation.** By occupying a specific street corner or some other public place, criminal gang members chill ordinary, legitimate passage by law-abiding citizens, thereby securing an area from which to conduct criminal activity -- most prominently and most usually, drug-dealing.

- **Facilitation.** The presence of loitering criminal gang members provides a context in which crime flourishes. A drug transaction in a loitering crowd, for example, provides cover, allows perpetrators to evade being caught, and creates a group dynamic of lawlessness that is larger than the sum of its individual parts. The conspicuous public presence of the gang also makes it difficult for innocent youths to resist the temptation (or outright pressure) to join one or another criminal gang.

- **Victimization.** A particularly cruel feature of criminal gang activity is the loss of young lives through gang shootings, be they the lives of fellow gang members or those of unfortunate bystanders. Loitering by persons with identifiable gang membership, the Chicago experience has shown, creates a frequent target for rival gangs.

Plainly, these reasons together with those identified in the extensive hearings before the Chicago City Council, suffice to establish a rational basis for enacting this law.

But even if these rational bases did not support the legislation in some circumstances, they most assuredly supply sufficient grounds to prevent the Illinois Supreme Court from striking the law facially, which is to say in all of its applications. A facial challenge is the most difficult to sustain. Because courts have a duty to save, not destroy, legislation, *see Adams*

Fruit Co. v. Barrett, 494 U.S. 638, 647 (1990), the Court has long held that a facial challenge may succeed only after the claimants have met their burden of showing "no set of circumstances" in which the law may be constitutionally applied." *United States v. Salerno*, 481 U.S. 739, 745 (1988); *See Reno v. Flores*, 507 U.S 292, 301 (1993). A similar rule governs vagueness challenges. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982) (facial challenge must be rejected unless the law is "impermissibly vague in all of its applications"). In some circumstances, if not in most or all circumstances, the police clearly do not violate substantive due process when they order individuals reasonably suspected of criminal gang activity to disperse.

CONCLUSION

For the foregoing reasons, the *amici* States respectfully urge the Court to grant the writ and reverse the lower-court decision.

Respectfully submitted,

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No. 97-1121

In the Supreme Court of the United States

October Term, 1997

CITY OF CHICAGO,

Petitioner,

v.

JESUS MORALES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION and THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

The organizations filing this amicus brief all have a vital interest in legal issues affecting the powers and responsibilities of local governments. The United States Conference of Mayors is the official nonpartisan organization of the more than 1,000 cities in the United States with populations of 30,000 or more. The National League of Cities is the country's oldest and largest organization serving municipal government. Its direct members include more than 1,400 cities of all sizes and 49 state municipal organizations; its total membership includes over 17,000 municipalities. The National Association of Counties represents over 3,000 counties. The International City/County Management Association is the professional association that represents the interests of over 8,800 appointed local government managers.

The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan organization consisting of over 1,400 local governments and their attorneys. Member governments operate IMLA through their chief legal officers. The International Association of Chiefs of Police, Inc. is the largest organization of police executives and managers in the world, consisting of more than 15,000 members from 72 nations.

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae*, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

Chicago's gang-loitering ordinance is a narrowly tailored response to the very serious problem of gang intimidation on city streets. As demonstrated in Part I below, urban gang violence has reached epidemic proportions as gangs have gained a stranglehold on many inner-city neighborhoods. Law-abiding citizens have become prisoners in their own homes, afraid to venture out because of the gang members who loiter in the streets outside their doors. Chicago's gang-loitering ordinance was designed to give police a weapon to break the gangs' stranglehold, by allowing officers to order groups of gang members congregating for no apparent purpose to disperse and to arrest those who refuse to "move on."

Purporting to apply this Court's decision in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the Illinois Supreme Court struck down the ordinance on grounds that would make it impossible for local governments to enforce almost any loitering ordinance. First, the court below found the very concept of "loitering" to be too vague to provide a predicate for the imposition of criminal penalties—even though in this case, the ordinance permitted a person loitering in the company of gang members to be arrested only if he or she refused a police order to "move on." Then, the court went even further, suggesting that a valid gang loitering ordinance could *never* be constructed, no matter how precise its wording, because it would inevitably infringe on a perceived constitutional right to loiter.

This Court should grant the City's Petition in order to remedy the confusion apparent in the lower courts concerning the proper reach of this Court's decision in *Papachristou*. As demonstrated in Part II below, the Illinois Supreme Court's conclusion that Chicago's gang-loitering ordinance is unconsti-

tutionally vague conflicts with numerous cases upholding loitering ordinances that are in many ways indistinguishable from the Chicago ordinance. In addition, as demonstrated in Part II below, the Illinois Supreme Court's recognition of a constitutional right to loiter is directly at odds with the California Supreme Court's recent decision in *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 602, cert. denied, 117 S. Ct. 2513 (1997), which expressly refused to recognize such a right. In *Acuna*, the California Supreme Court rejected constitutional challenges to an injunction that operated in much the same way as the Chicago ordinance, concluding that the public's right to be protected from gang violence and intimidation outweighed whatever conceivable liberty interest individual gang members might have in loitering on public streets.

Communities throughout the country are searching for new and innovative ways to control gang violence and intimidation. Decisions like this one inevitably chill legitimate experimentation. This Court should grant certiorari and reverse the decision below.

ARGUMENT

I. The Chicago Ordinance Is An Appropriate Response To Gang Warfare

A. Urban Gang Violence Has Reached Epidemic Proportions

America's cities are under siege. In most large urban areas, and increasingly in medium and small ones as well, stories of innocent persons shot in gang war crossfires have become staples of newspaper headlines and TV news. *E.g.*, Gammon, *Suspected Gang Member Held in Fatal Shooting of 13-Year-Old*, L.A. Times, Feb. 27, 1998, at B5; Power, *Boy headed to school killed by gang member, police say*, Dallas Morning News, Jan. 29, 1998, at 21A; Craig & Boyd, *Police order crackdown after drive-by killings*, Ft. Worth Star-Telegram, Jan. 7, 1998, at 1.

There are over 23,000 youth gangs in the United States, with over 650,000 gang members. U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention Fact Sheet #72 (Dec. 1997) ("OJJDP Fact Sheet"). Gangs are active in 98 percent of municipalities with populations over 100,000. Statement of Steven R. Wiley, Chief of FBI's Violent Crimes and Major Offenders Section, before the U.S. Senate Committee on the Judiciary, Apr. 23, 1997 ("Wiley Statement"). Chicago has some 125 street gangs, with more than 100,000 members. James B. Burns, U.S. Attorney, *Anti-Violent Crime Initiative Fact Sheet Northern District of Illinois* (1996). Four of Chicago's gangs —the Gangster Disciples, the Vice Lords, the Latin Kings, and the Latin Disciples—account for half of the city's gang members, dominate vast sections of the city, and have extended their tentacles into 35 states. Wiley Statement, *supra*.

These street gangs are not benign associations of disadvantaged youths, but sophisticated criminal enterprises. A recent study, based on interviews with 99 gang members in St. Louis, found that most members "define their gang in terms of criminal involvement." G. David Curry & Scott H. Decker, *What's in a Name?: A Gang by any Other Name isn't Quite the Same*, 31 Val. U. L. Rev. 501, 504 (1997). After statistically demonstrating that young people commit more crimes, and more serious crimes, during periods of gang membership than prior to entering or after leaving the gang, the study's authors concluded: "Gangs facilitate the commission of crime. To ignore that is to ignore (or worse, to excuse) the violence gang members commit against each other and their communities." *Id.* at 514.

Although criminal gangs have long been part of the urban landscape, they have taken a dramatic new direction in recent years, away from small-scale and localized activities to highly organized takeovers of entire neighborhoods based on the acquisition of lethal weaponry financed by the lucrative trade in crack cocaine. See Herbert C. Covey et al., *Juvenile Gangs* 101 (1992); Mills & Bunuel, *Small Gang's Big Grip Troubles Neighborhood—The Saints Have Grown More Violent And More Diverse Since Forming In The 1960s*, Chi. Trib., Feb. 11, 1998, at B1. Brass knuckles and baseball bats are no longer the weapons of choice. See *There Are No Children Here*, Economist, Dec. 17, 1994, at 21 ("Now automatic and semi-automatic assault weapons are *de rigueur*"). Chicago and Los Angeles alone accounted for over 1,000 gang homicides in 1994. OJJDP Fact Sheet, *supra*. As one researcher has concluded, "The amount of lethal violence currently directed by youth gangs in major cities both against one another and against the general public is without precedent." Covey, *Juvenile Gangs*, *supra*, at 27.

Vast stretches of the nation's cities have become the equivalent of war zones. A study of Chicago's gangs labeled them "a mobilized army, in the tens of thousands." Chicago Crime Commission, *Gangs: Public Enemy Number One* (1995). Gang-dominated parts of Los Angeles have been described as "small armies of youths fighting one another and the police." Stanley, *Child Warriors*, Time, June 18, 1990, at 30. Indeed, the U.S. Army has trained its doctors in a South Central hospital to familiarize them with the types of gunshot wounds they may encounter on the battlefield. Stanley, *Los Angeles: All Ganged Up*, Time, June 18, 1990, at 50.

The gangs themselves view their operations militarily. The Economist reported on an "area co-ordinator" of Chicago's Gangster Disciples who controls a stretch of turf ten blocks long and five blocks wide and who has 150 "soldiers" working for him. *There Are No Children Here*, *supra*. These gang "soldiers" are becoming progressively younger. See Thomas, *Putting Children on the Front Lines*, Wash. Post, June 20, 1996, at A1; Mills & Bunuel, *Not yet 13—and a murder suspect*, Chi. Trib., Feb. 4, 1998, at A1; *There Are No Children Here*, *supra* (citing Chicago anti-gang counselor's estimate that 80% of boys aged 13 to 15 in the area where he works are involved in gangs). Children growing up in gang-dominated neighborhoods often show signs of post-traumatic stress disorder. Alfredo Gonzalez et al., *Introduction* to *Gang Violence Prevention* 5-6 (1990). As one journalist reported several years ago, "many of the children emerge from the streets of Los Angeles more psychologically scarred than the young mujahedin who patrol the mountain passes of Afghanistan." Stanley, *Child Warriors*, *supra*, at 30.

B. The Gangs Use Street Intimidation As A Military Tactic

Stationing small groups of gang members on the streets is vital to the success of the gangs' criminal operations. These groups stake out and lay claim to gang turf, sell drugs to finance the procurement of arms, recruit new members (often coercively), serve as lookouts and intelligence gatherers, and intimidate neighborhood residents and passers-by. See Pet. 3. Intimidation takes many forms, including wearing gang colors and clothing, flashing gang signs, and plastering buildings with graffiti. See Michael Genelin, *Gang Prosecutions: The Hardest Game in Town*, in *The Gang Intervention Handbook* 417 (1993). Street-corner squads of gang members also facilitate the commission of violent gang crimes. See Malcolm W. Klein, *The American Street Gang* (1995); *Man Demanding Gang Affiliation Shoots Teen Standing on Street*, Chi. Trib., Feb. 17, 1998, at B3.

Law-abiding citizens are effectively imprisoned in their homes as a result of the mere presence of gang members on the streets. A California State Task Force on Gangs and Drugs observed that "[s]ome communities are literally held captive by the violence, intimidation and decay." California Council on Criminal Justice, State Task Force on Gangs and Drugs, *Final Report* 16 (1989). One woman told a court that the presence of gang members made her afraid to walk down her street to buy a loaf of bread in broad daylight. Zane, *Judgment against Owner of Crime-Ridden Building*, S.F. Chron., Mar. 21, 1995, at A18. Civil rights leader Jesse Jackson expressed the feelings of many when he stated, "Just to think we can't walk down our

own streets, how humiliating." Johnson, *Crime: New Frontier*, Chi. Sun-Times, Nov. 29, 1993, at 4.[2]

The California Supreme Court has vividly portrayed what can happen to a community when gang members are permitted to congregate without any effective control. Describing a four-square-block neighborhood in San Jose as "occupied territory," the court explained:

> Gang members, all of whom live elsewhere, congregate on lawns, on sidewalks, and in front of apartment complexes at all hours of the day and night. They display a casual contempt for notions of law, order, and decency—openly drinking, smoking dope, sniffing toluene, and even snorting cocaine laid out in neat lines on

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[2] Although some would argue that the police action authorized by the Chicago ordinance might have a harsh and disproportionate impact on minority youths, prominent African-American scholars have recognized that the failure of municipalities to take back the streets from gang members will permit the much harsher impact of gang violence to continue to flourish. In the words of Randall Kennedy, "the main problem confronting black communities in the United States is not excessive policing and invidious punishment but rather a failure of the state to provide black communities with the equal protection of the laws." Randall Kennedy, *The State, Criminal Law, and Racial Discrimination*, 107 Harv. L. Rev. 1255, 1256 (1994). See also Christo Lassiter, *The Stop and Frisk of Criminal Street Gang Members*, 14 Nat'l Black L.J. 1, 2 (1995) (urging the need to "stop and frisk" street gang members and to permit identifiable membership in a criminal gang to "alone constitute reasonable suspicion"). There can be no dispute that the most frequent victims of gang violence are law-abiding residents of minority communities. See Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, and Unequal* 179-198 (1992) (detailing racial demographics of crime victims).

> the hoods of residents' cars. The people who live in Rocksprings are subjected to loud talk, loud music, vulgarity, profanity, brutality, fistfights and the sound of gunfire echoing in the streets. Gang members take over sidewalks, driveways, carports, apartment parking areas, and impede traffic on the public thoroughfares to conduct their drive-up drug bazaar. Murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson, and theft are commonplace. * * * The people of this community are prisoners in their own homes.

People ex rel. Gallo v. Acuna, 929 P.2d 596, 601 (Cal. 1997).

Unchecked gang intimidation has a snowballing effect: law-abiding citizens feel pressured to move out of gang-ridden communities, leaving behind a neighborhood of increasingly concentrated criminal activity. Those who stay behind are unlikely to venture out into the streets, where "their simple presence would otherwise be a deterrent to crime." Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va. L. Rev. 349, 371 (1997). Indeed, residents may be afraid even to *report* a crime, because cooperating with the authorities may be perceived not only as dangerous, but useless as well. *Id.* at 376.

Children are particularly vulnerable to the intimidation of gang members congregating on the streets. Fear is the primary tool of gang recruitment. If you're a child and not in a gang, a Chicago anti-drug counselor told the Economist, "you're a target wherever you go." *There Are No Children Here*, *supra*. In Chicago, the heavy gang presence on the streets around the Robert Taylor Homes housing project has resulted in "waves of fear-induced absenteeism" from neighborhood

schools, prompting hundreds of volunteers to band together to shepherd children to school and the School Board to hire dozens of parents to serve as escorts. Braun, *Shepherds for a Flock in the Cross-Fire*, L.A. Times, Jan. 16, 1998, at A1; Martinez, *Parents paid to walk line between gangs and school*, Chi. Trib., Jan. 21, 1998, at A1.

C. Prophylactic Measures, Such As The Chicago Ordinance, Are Vital Tools.

Traditional police methods, even when coupled with increasingly stiff penalties on gang offenders, have failed to control gang violence and intimidation. See C. Ronald Huff, *Denial, Overreaction, and Misidentification*, in *Gangs in America* 310, 313 (C. Ronald Huff ed., 1990); Walter B. Miller, *Why the United States Has Failed to Solve Its Youth Gang Problem*, in *Gangs in America* 263, 267; *Steps Needed to Combat Gangs*, L.A. Times, Feb. 15, 1998, at B9 ("Efforts to rid our communities of gangs are either nonexistent or not working"). Gang-related violence "is so sporadic, so random, so hard to predict, that it's hard to stop," according to a police official in Elgin, a small city close to Chicago. "There's nothing that we haven't done or haven't tried to stop the gangs." Grandziel, *Gang Shootings Riddle the Peace Amid Local Rivals*, Chi. Trib., Jan. 15, 1998, at B1.

Studies show that gang murders are less likely to be solved than other murders, in part because they generally take place on the street and thus leave few physical clues. See *Gang Killings Exceed 40% of L.A. Slayings*, L.A. Times, Dec. 5, 1996, at A1. Moreover, gang intimidation often succeeds in frightening potential witnesses away from the courtroom, leaving prosecutors without a case. See *Acuna*, 929 P.2d at 614 (noting that numerous residents "refused to furnish declarations, fearing for their lives if any gang member should

discover their identities"); *Gang Violence to Silence Foes Grows*, Orlando Sentinel, June 18, 1997, at A4 (describing how gang members congregated in front of the Orlando courthouse to intimidate witnesses).

In light of the failure of traditional policing methods, leading criminologists have stressed the need for forceful preventive measures against gang activity. See James Q. Wilson, *Just Take Away Their Guns*, N.Y. Times Mag., Mar. 20, 1994, at 46-47. Local governments have taken a number of different approaches. For example, nearly a dozen cities in California—including Los Angeles, Pasadena, Norwalk, and San Jose—have sought civil injunctions against gang actions that constitute a public nuisance. Savage & Rivera, *Court Upholds Injunction Against Gangs*, L.A. Times, June 28, 1997, at A1. Other communities have stepped up enforcement of teen curfews.

Like the Chicago ordinance, these approaches seek to prevent serious crime *before* it occurs by breaking the gangs' stranglehold on the streets and destroying their aura of invincibility. Dispersing gang members and arresting them for violating a loitering or similar ordinance disrupts their ability to commit more serious crimes. Moreover, it sends a clear signal that the community will no longer tolerate gang intimidation and disorder. Over time, that strategy should allow law-abiding citizens to regain control of the streets and encourage young people who are now forced into gangs to resist their recruitment efforts. See David Matza, *Delinquency and Drift* 52-59 (1990). In fact, the empirical evidence cited by the City in its Petition shows that the Chicago ordinance did succeed in substantially decreasing gang crime. See Pet. 9.

For all of the reasons outlined below and in the City's Petition, the Chicago ordinance is "a legitimate and appropriate

means by which to combat the problems of escalating violence and crime in American cities." Lisa A. Kainec, Comment, *Curbing Gang Related Violence in America*, 43 Case W. Res. L. Rev. 651, 652 (1993). Indeed, in many ways, it is a more effective and less restrictive alternative than other measures that have been found constitutional. The kind of injunctions against gang activity upheld by the California Supreme Court in *Acuna* have proven difficult to enforce. See L. Sherman, *Oceanside gang becoming active despite injunction, police confirm*, San Diego Union-Trib., Feb. 18, 1998, at B3. And teen curfews are much more intrusive than Chicago's narrowly-targeted loitering ordinance, since they restrict the liberty of *all* teenagers.[3]

II. The Illinois Supreme Court's Interpretation Of *Papachristou* Conflicts With Numerous Cases Upholding The Validity Of Loitering Ordinances.

This Court long has recognized that cities have the right to prevent "antisocial conduct" on their streets and sidewalks through ordinances directed with "reasonable specificity" toward the prohibited conduct. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). In this case, however, the Illinois Supreme Court struck down Chicago's gang-loitering ordinance on the ground, among others, that it failed to provide a sufficient explanation of the conduct prohibited and left too much discretion to individual police officers to decide who could and could not be ordered, on pain of arrest, to "move on."

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[3] Curfews are also difficult and costly to enforce. A recent survey by *amicus* U.S. Conference of Mayors found that 276 of 347 responding cities had nighttime curfews for teenagers, but reported that many respondents complained of the high costs involved in enforcing those curfews. See *More cities use curfews to try to cut youth crime*, Chi. Trib., Dec. 1, 1997, at A10.

The court rejected the argument that the officer's discretion was properly limited by the requirement that an order to disperse be given only if he "reasonably believe[d]" that a group of loiterers included a member of a criminal street gang. Pet. App. 61a. Citing this Court's decision in *Papachristou*, the court below treated that limitation as immaterial, concluding that Chicago's ordinance effectively allowed police to arrest anyone they deemed to be undesirable. Pet. App.17a.

In fact, the ordinance does no such thing. No one can be arrested without first disobeying an order to "move on." Moreover, an order to "move on" will not be valid unless the officer had a reasonable suspicion that one of the people standing around in a group for no apparent purpose was a member of a criminal gang. The Chicago City Council expressly found that "loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity." Pet. App. 60a-61a. Thus, the ordinance is designed to allow an officer to issue an order to "move on" only in circumstances where there is a reasonable apprehension of a likely threat to the safety of persons or property.

The Chicago ordinance is similar in many respects to more traditional loitering ordinances, which have often —although not always—been upheld against vagueness challenges. For example, in *City of Milwaukee v. Nelson*, 439 N.W.2d 562, 563 n.1 (Wis. 1989), the Wisconsin Supreme Court rejected a vagueness challenge to an ordinance that prohibited loitering "in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that

warrant alarm for the safety of persons or property."[4] Accord *State v. Ecker*, 311 So. 2d 104, 109 (Fla. 1975); *Bell v. State*, 313 S.E.2d 678 (Ga. 1984) (upholding a similar ordinance); *Salt Lake City v. Savage*, 541 P.2d 1035, 1036 (Utah 1975) (same); *State v. Starks*, 186 N.W.2d 245 (Wis. 1971) (same); *City of Seattle v. Drew*, 423 P.2d 522 (Wash. 1967) (same).In *Ecker*, the Florida Supreme Court rejected the argument that the ordinance was unconstitutional because it was subject to the kind of arbitrary enforcement condemned in *Papachristou*, noting that the circumstances that would permit an officer to make a stop pursuant to the ordinance "are not very different from those that the United States Supreme Court described as 'specific and articulable facts' in *Terry v. Ohio*, [392 U.S. 1, 21 (1968)]." 311 So. 2d at 110.

Although a number of courts have disagreed and struck down similar loitering ordinances,[5] *Terry* provides a logical framework for limiting an officer's discretion under traditional loitering ordinances and under the Chicago ordinance as well. In *Terry*, this Court reached a reasonable accommodation between individual and community rights by permitting police officers to pat down suspects whom they reasonably suspect of contemplating a crime. That decision allayed the same kinds of concerns about arbitrary enforcement voiced by the Illinois

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[4] The ordinance challenged in *Nelson* is based on the American Law Institute's Model Penal Code § 250.6. See 439 N.W.2d at 565.

[5] See *City of Bellevue v. Miller*, 536 P.2d 603 (Wash. 1975) (striking down an ordinance similar to that upheld in the *Nelson* case); accord *City of Portland v. White*, 495 P.2d 778 (Or. Ct. App. 1972); *Powell v. Stone*, 507 F.2d 93 (9th Cir. 1974), rev'd on other grounds, 428 U.S. 465 (1976); *United States ex rel. Newsome v. Malcolm*, 492 F.2d 1166 (2d Cir. 1974), aff'd, 420 U.S. 283 (1975); *People v. Berck*, 300 N.E.2d 411 (N.Y. 1973).

Supreme Court here, by crafting an objective standard—"reasonable suspicion"—based on how "a reasonably experienced police officer" would construe the facts at hand. 392 U.S. at 21-22. The Chicago ordinance is simply an application of the *Terry* principle that an experienced police officer should be able to take appropriate crime prevention measures based on a reasonable suspicion informed by objective factors. See also *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (reaffirming *Terry* reasonableness standard); *id.* at 380 (Scalia, J., concurring) (under the common law at the time the Bill of Rights was ratified, it was "reasonable to detain suspicious persons for the purpose of demanding that they give an account of themselves").

Like a *Terry* stop, an order to disperse under the Chicago ordinance and the implementing Police Department Order (see Pet. App. 66a-67a) has to be based on objective criteria that lead to reasonable suspicion by an experienced police officer. But those criteria are relatively easy to define. Gang members make a point of flaunting their membership, via particular tattoos, jackets, clothing colors, clothing position (*e.g.*, the direction their hats or belt buckles face), hand signals, and hair styles. See Martin S. Jankowski, *Islands in the Street: Gangs and American Urban Society* (1991); *Davis v. State*, 1998 WL 57720, at *9-*10 (Ala. Feb. 13, 1998) (describing how bandanna colors identify gang affiliation). As a result, gang membership lends itself to articulable, objective, and reasonable discernment by well-trained and experienced police officers.[6]

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[6] Indeed, an identification of gang membership is likely to be a good deal more objective than the kind of drug courier profile that this Court found to be sufficient to justify detention of an alleged

(continued...)

The Illinois Supreme Court's void-for-vagueness analysis is indicative of the confusion that surrounds loitering ordinances generally.[7] *Amici* urge this Court to grant the City's Petition in order to dispel that confusion and enable local governments to enforce reasonably drawn measures to control crime, like Chicago's gang-loitering ordinance.

III. The Illinois Supreme Court Erred In Concluding That The Ordinance Unreasonably Intrudes Upon Constitutional Protected Activity.

This Court should also grant the City's Petition to review the Illinois Supreme Court's conclusion that *Papachristou* recognizes an apparently absolute constitutional right to loiter. As the City points out, the California Supreme Court recently considered—and rejected—the very same argument in *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal.

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[6](...continued)
drug trafficker in *United States v. Sokolow*, 490 U.S. 1 (1989).

[7] The courts are also sharply divided on whether *Papachristou* requires invalidating ordinances that proscribe "loitering plus." Compare, *e.g.*, *City of Tacoma v. Luvene*, 827 P.2d 1374, 1379 (Wash. 1992) (upholding a drug-loitering ordinance that makes it unlawful "to loiter in or near any thoroughfare, place open to the public, or near any public or private place in a manner and under circumstances manifesting the purpose to engage in drug-related activity"); *State v. VJW*, 680 P.2d 1068, 1070 (Wash. Ct. App. 1984) (upholding a Seattle "prostitution loitering" ordinance); and *City of Akron v. Holley*, 557 N.E.2d 861, 867 (Ohio Mun. Ct. 1989) (upholding a drug-loitering ordinance), with *American Civil Liberties Union v. City of Alexandria*, 747 F. Supp. 324 (E.D. Va. 1990) (invaliding an ordinance similar to Tacoma's); *Wyche v. State*, 619 So. 2d 231 (Fla. 1993) (same); *E.L. v. State*, 619 So. 2d 252, 253 (Fla. 1993) (same); *Johnson v. Carson*, 569 F. Supp. 974, 975 (M.D. Fla. 1983) (striking down a prostitution-loitering ordinance).

1997). In that case, the court upheld an injunction against gang activity that was found to constitute a public nuisance. In practice, the injunction was in many ways more restrictive than the Chicago ordinance, enjoining dozens of gang members from, among other things, "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant * * * or with any other known" member of the identified gangs. *Id.* at 608. Despite the breadth of the injunction, the California Supreme Court declined to find that the gang members' constitutional rights to associate were implicated. Because the injunction did not infringe on either intimate or private activity or joint political or social advocacy, the court concluded that it simply did not implicate any constitutionally protected interest. *Id.* at 609.

In any event, the Illinois Supreme Court erred in concluding that whatever intrusion there might be into protected "liberty" interests was unreasonable. As the California Supreme Court recognized in *Acuna*, a court must consider not only the rights of gang members, but also the rights of the community:

> The state has not only a right to "maintain a decent society," but an obligation to do so. * * * [T]he community's right to security and protection must be reconciled with the individual's right to expressive and associative freedom. Reconciliation begins with the acknowledgment that the interests of the community are not invariably less important than the freedom of individuals. Indeed, the security and protection of the community is the bedrock on which the superstructure of individual liberty rests.

Id. at 603 (citation omitted).

By concentrating solely on the "liberty" interests of people who had refused to "move on" in response to a police order, the Illinois Supreme Court ignored the liberty interests of law-abiding citizens. As the record in this case and numerous scholarly studies demonstrate, permitting groups of gang members to camp out on city streets impedes the very liberties invoked by the court below—to travel, to move freely, and to associate with others. People living in gang-infested neighborhoods who wish to walk along their streets and associate with their neighbors have every right to do so free of threats, whether voiced or silent, and to expect the police to take crime prevention measures to promote their personal safety and the integrity of their homes, businesses, and communities.

In his concurring opinion in *Kovacs* v. *Cooper*, 336 U.S. 77, 89 (1949), Justice Frankfurter remarked that "[w]ise accommodation between liberty and order always has been, and ever will be, indispensable for a democratic society." The Chicago ordinance provides a good example of just such a "wise accommodation." The ordinance recognizes that individual liberties are hollow without community safety. Although it imposes some restraints on the ability of some individuals to stand on the street for no apparent purpose, those restraints are minimal and more than justified by their potential to greatly expand the liberties enjoyed by law-abiding residents.

As the California Supreme Court observed in *Acuna*, to allow the liberty of the peaceful and industrious residents of a community to "be forfeited to preserve the illusion of freedom for those whose ill conduct is deleterious to the community as a whole is to ignore half the political promise of the Constitution and the whole of its sense." 929 P.2d at 618. The Chicago ordinance implements the most basic promises of our Constitution—to "insure domestic Tranquility, provide for the

common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity." This Court should reverse the court below to enable Chicago to give effect to those promises and to prevent the horrors of gang violence from rendering them meaningless.

CONCLUSION

For the reasons outlined above and in the City's Petition, the *amici* urge the Court to grant the City's Petition and to reverse the judgment below.

Respectfully submitted.

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No. 97-1121

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CITY OF CHICAGO,

Petitioner,

v.

JESUS MORALES, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois

BRIEF *AMICI CURIAE* OF CHICAGO NEIGHBORHOOD ORGANIZATIONS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the right to loiter on public streets with members of a criminal street gang is one of the traditional "amenities of American life" that, under principles of "substantive due process," may not abridged by a police order to disperse.

2. Whether an ordinance that (i) specifically defines "loitering" and "criminal street gangs," (ii) authorizes police to order the dispersal of a group of loiterers when there is probable cause to believe that members of criminal street gangs are among the group, and (iii) permits the arrest of those loiterers who disobey the order to disperse, is so lacking in clarity that it is void for vagueness in all of its applications.

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BRIEF *AMICI CURIAE* OF CHICAGO NEIGHBORHOOD ORGANIZATIONS IN SUPPORT OF PETITIONER

Amici curiae Chicago Neighborhood Organizations respectfully submit this brief in support of petitioner, the City of Chicago.[1]

INTEREST OF *AMICI CURIAE*

Amici curiae are a number of neighborhood organizations and community groups in the City of Chicago. *See* App., *infra*. *Amici* represent concerned Chicago citizens and voters who are actively involved in identifying and implementing programs to stem the epidemic of drug abuse, violence, and

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

other gang-related criminal activities that plague their neighborhoods and our Nation's urban areas generally. *Amici* are concerned that the Illinois Supreme Court's decision unreasonably thwarts the reasoned determination by the people's elected representatives that responsible community-based policing of members of criminal organizations can prevent and deter gang-related crime in Chicago.

Amici represent the interests of the very people for whom the gang-loitering ordinance was enacted: They live in many of the Chicago communities hit hardest by gang-related crime, and are afraid to walk about in their own neighborhoods as a result of gang-related crime and violence. They saw firsthand that the ordinance, before it was declared unconstitutional, improved the quality of life in their communities.

Amici believe that community policing generally, and particularly the gang-loitering ordinance under review, benefits *all* residents of the communities in which gangs are active, including both law-abiding citizens and the young people—their children, siblings, and relatives—who are most at risk from the dangers of gang membership. Moreover, *amici* see no constitutional infirmity in reasonable efforts to rid their streets of the scourge of criminal street gangs, and they support the City's efforts to reinstate and enforce the ordinance that was enacted explicitly to safeguard the safety, security, and liberty of their members.

STATEMENT

1. Recent years have seen a dramatic change in the way many big-city police departments respond to criminal behavior. Rather than focusing solely on solving serious crimes that already have occurred, police increasingly take measures to prevent crime before it happens. Police intervention in relatively small-scale disorder—for example, preventing rowdy, drunken and antisocial behavior; eradicating graffiti, litter and vandalism; and enforcing curfew, cruising and loitering laws—has been shown to make neighborhoods safer

places and to reduce the incidence of more serious criminal activity.[2]

The increasingly prevalent strategy of using police to maintain order in urban communities, in addition to the traditional police role of solving serious crimes, generally is referred to as "community policing."[3] Although the concept can be implemented through a variety of means, a central tenet of community policing is that "working partnerships between the police and the community can play an important role in reducing crime and promoting security."[4] In other words, "[i]t promises that police will be responsive to the expressed needs of the communities they serve."[5]

A principal impetus for the community policing movement is the common-sense notion that there is less crime in orderly neighborhoods. As a leading article explained, "if a

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[2] For example, New York City police implemented such a program in 1993, focusing on such low-level offenses as vandalism, panhandling, public drunkenness, unlicensed vending and prostitution. In the ensuing several years, this strategy proved to be effective in reducing the level of serious crime: The murder rate dropped nearly 40 percent, the robbery rate more than 30 percent, and the burglary rate more than 25 percent. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va. L. Rev. 349, 367 (1997). Crime in New York is decreasing at more than twice the national average, and is at its lowest level in more than 25 years. "City officials and at least some criminologists credit the larger reduction in crime rates to [the] recent emphasis on 'order maintenance.'" *Id.* at 368-369; *see* Kelling & Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* 151-156 (1996).

[3] *See* Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551, 573-578 (1997).

[4] Moore, *Problem-Solving and Community Policing*, in Tonry & Morris, eds., *Modern Policing* 99, 123 (1992).

[5] Skogan, *Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods* 90 (1990).

window in a building is broken and left unrepaired, all the rest of the windows will soon be broken. . . . [O]ne unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing."[6] Signs of disorder in public streets—*e.g.*, broken windows, litter, drunks or drug addicts slumped on the sidewalk, or loitering gang members—cause the law-abiding public to avoid public rights of way and thus severely dilute the kinds of informal social checks that traditionally have permitted all of us to look after each other and to keep our streets safer. "[I]t is more likely that here, rather than in places where people are confident they can regulate public behavior by informal controls, drugs will change hands, prostitutes will solicit, and cars will be stripped."[7] Community policing is thus founded on the notion that "the police ought to protect communities as well as individuals," and that, accordingly, "the police—and the rest of us—ought to recognize the importance of maintaining, intact, communities without broken windows."[8]

2. In 1992, the Chicago City Council held extensive hearings on the vexing public-safety problems posed for that city's residents by criminal street gangs. After extensive testimony from law enforcement and from community residents who lived under the terror created by those gangs, the City Council found that "the continuing increase in criminal street gang activity in the City [was] largely responsible" for an "increasing murder rate as well as an increase in violent and drug related crimes," and that "the burgeoning presence of street gang members in public places has intimidated many law abiding citizens." Pet. App. 60a.

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6 Wilson & Kelling, *Broken Windows*, The Atlantic Monthly 29, 31 (Mar. 1982) (emphasis omitted).

7 *Id.* at 32.

8 *Id.* at 38.

The City Council specifically found that, apart from "creat[ing] a justifiable fear for the safety of persons and property in the area" (*ibid.*), loitering involving members of criminal street gangs furthered the gangs' criminal activities in two important and distinct ways. First, gang members "avoid arrest" for their street crimes by eschewing overt criminality and simply loitering "when they know the police are present." *Ibid.* Second, loitering is indispensable to the notion of gang "turf"—*i.e.*, the assertion by a particular criminal gang of the right to *control* a given area of the City to the detriment of competing gangs and the members of the law-abiding public—because "[o]ne of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas." *Ibid.*

In view of those findings, the City Council adopted an ordinance authorizing police officers to order gang members who are loitering in public areas (or those loitering with them) to disperse, and to arrest those who refuse to do so:

> Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

Pet. App. 61a. The ordinance carefully defined each of its operative terms. The phrase "criminal street gang" was defined to require, among other things, an organization engaged in a pattern of specifically identified state crimes. Pet. App. 61a-62a. The term "loiter" was defined as "to remain in any one place with no apparent purpose." Pet. App. 61a.

In addition, the Chicago Police Department adopted detailed guidelines governing the enforcement of the gang-loitering ordinance. The ordinance was enforced only in "areas frequented by members of criminal street gangs which, because of their location, significantly affect the ac-

tivities of law-abiding persons in the surrounding community." Pet. App. 68a. Such areas were to be designated after consultation with "local officials, leaders of local community organizations, and other citizens likely to be able to provide reliable information." *Ibid.* Thus, in the finest spirit of community policing, the police explicitly entered into a partnership with neighborhood residents to identify those areas in which gangs were destroying the fabric of community life, and to enforce the ordinance in those areas to enhance the security and safety of all residents.

3. Respondents were separately arrested for disobeying a police order to disperse or "move along" under Chicago's gang-loitering ordinance and challenged the validity of the ordinance on numerous constitutional grounds. After separate proceedings in the lower state courts, the Supreme Court of Illinois consolidated respondents' challenges and agreed with respondents that the ordinance is inconsistent with the federal Constitution.

The court first concluded that the ordinance is void for vagueness. Pet. App. 6a-17a. The court explained that, even though the term "loiter" is specifically defined by the ordinance as "remain[ing] in one place with no apparent purpose," the term fails to give persons of ordinary intelligence sufficient notice of what is prohibited, because "[p]eople with entirely legitimate and lawful purposes will not always be able to make their purposes apparent to an observing police officer." Pet. App. 10a. That infirmity was not cured, in the court's view, by the requirement that the officer have probable cause to believe that one of the loiterers is a gang member, by the fact that it is a legal defense under the ordinance that no member of the group was in fact a gang member, or by the fact that prosecution is possible only if the defendant disobeys a clear order to disperse. As the court saw it, the city may not criminalize even a defendant's *knowing* participation in, or association with, criminal street gangs (Pet. App. 12a), and it may not confer on police authority to

disperse loiterers "if the underlying statute is itself impermissibly vague." Pet. App. 13a.

The court also concluded that the purported "vagueness" of the ordinance improperly encouraged "arbitrary and discriminatory enforcement" Pet. App. 14a. In this connection, the court was especially critical of the Chicago Police Department's effort to set forth specific written guidelines for enforcing the ordinance, a step that the court conceded was contemplated by the City Council, because in the court's view "lawmakers may not abdicate their responsibilities for setting the standards of the criminal law." Pet. App. 15a.

Finally, the court emphasized that Chicago's ordinance "is an arbitrary exercise of the city's police power and, thus, violates substantive due process." Pet. App. 17a. The court believed that its conclusion was compelled by *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972), which, in the court's view, stood for the proposition that the type of loitering prohibited by the ordinance is one of the traditional "amenities of American life." Pet. App. 17a (citing *Papachristou*, 405 U.S. at 164). The "amenities" invaded by the Chicago ordinance, in the court's view, included "the general right to travel, the right of locomotion, the right to freedom of movement, and the general right to associate with others." Pet. App. 18a (citations omitted).

In light of its conclusion that the gang loitering ordinance violates due process, the court found it unnecessary to examine respondents more specific claims under the First, Fourth, and Eighth Amendments. Pet. App. 5a, 19a.

REASONS FOR GRANTING THE PETITION

The Supreme Court of Illinois concluded in this case that the right to loiter with members of criminal street gangs is an "amenit[y] of American life" that includes a plethora of rights that are protected from government intervention by principles of "substantive due process." Pet. App. 17a-18a. The court also concluded that Chicago's gang loitering ordinance is an "arbitrary restriction" of those rights (Pet. App.

19a), because its purported "vagueness" encourages arbitrary law enforcement. Pet. App. 18a-19a, 14a-15a. Those conclusions, in the court's view, obviated any need to consider respondents' claims that the ordinance violates specific provisions of the Bill of Rights.

Neither the mode of analysis employed, nor the conclusions reached, by the Illinois Supreme Court can be reconciled with this Court's cases. This Court's precedents *forbid* the invocation of "substantive due process" in contexts already addressed by specific provisions of the Bill of Rights. The court below, however, neatly avoided respondents' claims under the Bill of Rights, which were obviously meritless, and awarded them relief on essentially the same allegations simply by inventing *broader* rights under the guise of "due process." The court similarly misused the narrow due process doctrine of vagueness, which is addressed to the *clarity* of legislation, to invalidate an ordinance that is unquestionably clear but that the court believed was, as a policy matter, *too broad*. Again, however, the breadth of legislation is cause for its invalidation *only* when it is shown that such legislation reaches substantial amounts of *constitutionally protected* conduct—*i.e.*, only upon analysis of the very questions under the Bill of Rights that the court below expressly refused to address. Because the erroneous ruling below exacerbates longstanding conflicts about the permissible scope of loitering and other community policing ordinances, and effectively disables an entire State of the Union from addressing a pressing social problem, this Court's review is clearly warranted.

1. The mode of analysis employed by the Supreme Court of Illinois put the cart before the proverbial horse. This Court has repeatedly made clear that if an "explicit textual source of constitutional protection" applies, government action must be analyzed under that standard "rather than under a 'substantive due process' approach." *Graham* v. *Connor*, 490 U.S. 386, 395 (1989). In *Graham*, the Court applied that principle to hold that substantive due process has

no place in analyzing claims that police used "excessive force" during an arrest, which must instead be gauged *solely* under the Fourth Amendment. As the Court put it, "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Id.* at 395.

The Court reaffirmed that principle in *Albright* v. *Oliver*, 510 U.S. 266 (1994), which rejected the notion that substantive due process embodies some right to be free from "arbitrary" prosecutions. As the Chief Justice explained, "[i]t was through [the] provisions of the Bill of Rights that their Framers sought to restrict the exercise of arbitrary authority by the Government in particular situations." *Id.* at 273 (plurality). Thus, the Court concluded, only the specific Amendment that addresses the "particular sort of government behavior," rather than notions of substantive due process, should be applied to claims challenging that particular behavior. *Ibid.*; *see also id.* at 288-289 (Souter, J., concurring in judgment) (applying general "rule of reserving due process for otherwise homeless substantial claims"). And only last Term, the Court unanimously emphasized that "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States* v. *Lanier*, 117 S. Ct. 1219, 1228 n.7 (1997).[9]

The decision below got that principle exactly backwards, because it expressly refused to address the specific provi-

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[9] *See, e.g., Mays* v. *City of St. Louis*, 123 F.3d 999 (7th Cir. 1997) (Fourth Amendment alone controls conduct of police officer who gave chase that resulted in death); *Armendariz* v. *Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc) (Just Compensation Clause, not due process, controls claims for inverse condemnation).

sions of the Bill of Rights that speak to respondents' claims and resolved those claims instead by reference to the amorphous requirements of "substantive due process." That is a key error, because it is obvious from this Court's cases that Chicago's ordinance offends *none* of the provisions of the Bill of Rights that the ordinance implicates. Because the Bill of Rights speaks to—and does not invalidate—the bulk of the governmental conduct that the court below found objectionable, its "requirements are not to be supplemented through the device of 'substantive due process.'" *Albright*, 510 U.S. at 276 (Scalia, J., concurring).

The most germane provision of the Bill of Rights is, of course, the Fourth Amendment. As Judge Easterbrook recently noted, it is clear that this "Court has looked exclusively to the fourth amendment for substantive limits to searches and seizures," *Mays*, 123 F.3d at 1002 (emphasis added), attempted seizures, *see California* v. *Hodari D.*, 499 U.S. 621 (1991), and even entirely consensual encounters in which police purportedly communicate to a citizen that "he [is] not at liberty to ignore the police presence and go about his business." *Florida* v. *Bostick*, 501 U.S. 429, 437 (1991).

Chicago's ordinance is fully consistent with the Fourth Amendment. Even if an officer's order to disperse could be considered a "seizure," *but see Brower* v. *County of Inyo*, 489 U.S. 593 (1989), Chicago police will issue such an order *only* "when there is *probable cause* to believe that criminal street gang members are loitering in a designated area." Pet. App. 72a (emphasis added). The existence of probable cause objectively justifies the minimal intrusion on individual liberty that the Chicago ordinance contemplates, and it accordingly constitutes the best guarantee of "evenhanded law enforcement." *Horton* v. *California*, 496 U.S. 128, 138 (1990); *compare Brown* v. *Texas*, 443 U.S. 47, 50-53 (1979) (invalidating "stop and identify" statute under the Fourth Amendment, because statute did not require officer to have probable cause or reasonable suspicion). That point was unanimously emphasized by the Court only two years ago,

when this Court rejected the claim that the vehicular traffic laws are so broad and pervasive that they essentially license "the police to single out whomever they wish for a stop." *Whren* v. *United States*, 116 S. Ct. 1769, 1777 (1996). As the Court emphasized in *Whren*, the existence of probable cause is sufficient to justify interference with an individual's freedom of movement, since "the usual rule [is] that probable cause to believe the law has been broken 'outbalances' private interest in avoiding police contact." *Ibid.*[10]

While this Court's cases recognize that particular governmental conduct may implicate more than one "textual source" of protection, *Soldal* v. *Cook County*, 506 U.S. 56, 70 (1992); *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 49-50 (1993), respondents' claims are even more implausible when examined in light of other provisions of the Bill of Rights. Chicago's ordinance does not create a "status" offense (Pet. App. 5a), because it requires affirmative volitional *conduct*—loitering, membership in (or association with) a criminal street gang, and disobedience of a police order. *See Powell* v. *Texas*, 392 U.S. 514, 533 (1968). Nor does the ordinance interfere with associational rights protected by the First Amendment. Standing on a street corner with members of a criminal street gang "might be described as 'associational' in common parlance," but loitering "simply do[es] not involve the sort of expressive association that the First Amendment has been held to protect." *Dallas* v. *Stanglin*, 490 U.S. 19, 24 (1989). Rather, the activity proscribed by the ordinance is analogous to "walking down the street or meeting one's friends at a shopping

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[10]Indeed, the Court expressly disclaimed the *ability* to engage in the sort of open-ended review that the court below adopted here under the guise of "substantive due process": "[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement." *Whren*, 116 S. Ct. at 1777.

mall"—which this Court has held outside the ambit of First Amendment protections. *Id.* at 25. Just as the Constitution does not recognize a "generalized right of 'social association' that includes chance encounters in dance halls" (*ibid.*), it does not create any right of "criminal association" that includes the right to remain on a street "with *no* apparent purpose" *other* than to associate with a "criminal street gang."

The proper mode of constitutional analysis, therefore, demonstrates that Chicago's ordinance does not violate any of the textual provisions it arguably implicates. Those textual provisions, "not the more generalized notion of 'substantive due process'" (*Graham*, 490 U.S. at 395), must therefore control respondents' assertion that Chicago's ordinance unduly invades their liberty interests in remaining on a public street without police interference. And, as demonstrated below, this Court's cases make it absolutely clear that the ordinance is also consistent with the requirement of "fair warning"—the *only* remaining liberty interest that was identified by the Supreme Court of Illinois *and* has been recognized by this Court's cases.

2. "The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright*, 510 U.S. at 272 (plurality).[11] This Court's reluctance

[11] The "rights" of loiterers that the Chicago ordinance purportedly infringes are, needless to say, "markedly different from those recognized in this group of cases." *Albright*, 510 U.S at 272. While this Court has recognized a limited constitutional right to *interstate* travel—"or, more precisely, the right of free interstate migration" (*Attorney General of N.Y.* v. *Soto-Lopez*, 476 U.S. 898, 902 (1986))—it has never held that the Constitution prohibits restrictions on intrastate (much less intracity) travel. *Cf. Hodgson* v. *Minnesota*, 497 U.S. 417, 435 (1990). The Court certainly has never recognized a constitutional right to travel—or "locomote," or "move around"—sufficiently elastic to comprehend a "right" to "remain in one place with no apparent purpose" other than to congregate with criminal street gangs.

to invoke "substantive due process" has nowhere been more pronounced than in matters touching on what conduct States choose to make criminal. States enjoy wide latitude in this area, *see, e.g.*, *Martin* v. *Ohio*, 480 U.S. 228, 232 (1987), and courts therefore "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Medina* v. *California*, 505 U.S. 437, 445 (1992); *Montana* v. *Egelhoff*, 116 S. Ct. 2013, 2024-2025 (1996) (Ginsburg, J., concurring in judgment). A State's decision in this regard is not subject to due process challenge unless it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina*, 505 U.S. at 445; *Egelhoff*, 116 S. Ct. at 2025 (Ginsburg, J., concurring in judgment). And, of course, it is respondents' burden to establish affirmatively that the ordinance they challenge transgresses fundamental principles of justice. *See Egelhoff*, 116 S. Ct. at 2019 (plurality). This they cannot do.

The *only* "firmly rooted" principle recognized by this Court that relates to respondents' claims here is the requirement of "fair warning " embodied in the void-for-vagueness doctrine. Contrary to the apparent assumption of the Illinois Supreme Court, however, the vagueness doctrine—like other due process doctrines—does not give the judiciary "a 'chancellor's foot' veto over law enforcement practices of which it [does] not approve." *United States* v. *Russell*, 411 U.S. 423, 435 (1973). As this Court made clear only last Term, the essence of vagueness review is simply the requirement of "fair warning," which centers on the use of "language that the common world will understand[] of what the law intends to do if a certain line is passed." *Lanier*, 117 S. Ct. at 1224 (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) (Holmes, J.)); *see also Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). Accordingly "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Lanier*, 117 S. Ct. at 1225.

The gang-loitering ordinance easily meets that standard. It clearly defines membership in a "criminal street gang" by reference to a "pattern" of expressly identified state crimes. *Cf. Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 59 n.7 (1989) (noting that state RICO statute's "pattern" requirement is "inherently *less* vague" than underlying crimes). The ordinance also clearly informs citizens of the prohibited conduct: "[R]emaining in one place with no apparent purpose" in the company of one or more members of a "[c]riminal street gang." App. 61a. Ordinary people are perfectly capable of understanding what the ordinance proscribes. Lest there be any doubt, however, an arrest can be made only after a police officer *informs* the loiterers of their legal obligations under the ordinance and they refuse a lawful order to disperse. There can be no question but that a person in those circumstances "should understand that he could be convicted . . . if he fails to obey an order to move on." *Colten* v. *Kentucky*, 407 U.S. 104, 110 (1972); *cf. Schenck* v. *Pro-Choice Network*, 117 S. Ct. 855, 869-870 (1997) (defendants, to whom injunction was specifically directed, "certainly" were given "a reasonable opportunity to know what was prohibited").[12]

In reaching the opposite conclusion, the Illinois Supreme Court placed nearly dispositive, but mistaken, reliance on two passages from *Papachristou*. The first passage referred to "amenities of life" that are "not mentioned in the Constitution or in the Bill of Rights" but that nonetheless may be elements of due process. 405 U.S. at 164; *see* Pet. App. 17a. That passage, however, is not a license for lower courts to

[12] It simply blinks reality to suggest that the aldermen, the police, the general public, and especially the gang members themselves do not know what the Chicago ordinance outlaws. Indeed, unless the opinion below is an exercise in disingenuity, the justices of the state supreme court may be the only people in Illinois who do *not* know what it means.

discover those "amenities" on their own and in the teeth of the methodology prescribed by this Court in *Graham, Albright,* and *Lanier*; indeed, only the most benighted view of what "historically [has been] part of" those "amenities" (*Papachristou*, 405 U.S. at 164) could lead to the conclusion that loitering with criminal gangs is among them. In the second passage on which the court below relied, *Papachristou* emphasized that the activities outlawed by Jacksonville's ordinance "by modern standards are normally innocent." *Id.* at 163; Pet. App. 9a. As its context makes clear, however, nothing in that passage purported to confer on the lower courts unguided discretion to second-guess legislative judgments that specific conduct is *not* "innocent"—the Court's point was simply that an ordinance's lack of clarity is an especial source of concern when the ordinance is applied to conduct that a citizen would not otherwise recognize as culpable. *See Papachristou*, 405 U.S. at 162-163 (emphasizing need for "fair notice"). As already demonstrated, lack of *clarity* is not a failing that can fairly be ascribed to Chicago's ordinance.

Indeed, the Illinois Supreme Court's real difficulty with the ordinance apparently was not that it is unclear, but that it is too *broad*:

> The city has declared gang members a public menace and determined that gang members are too adept at avoiding arrest for all the other crimes they commit. Accordingly, the city council drafted an exceptionally broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets.

Pet. App. 16a. Overbreadth is, of course, a distinct constitutional doctrine. Like vagueness, however, it is limited in reach.[13] This Court has made clear that a legislative enact-

[13] The repeated citation by the court below of *Shuttlesworth* v. *Birmingham*, 382 U.S. 87 (1965), an overbreadth case, suggests that the

ment can be declared unconstitutionally "overbroad" only if it "prohibits constitutionally protected conduct." *Grayned* v. *City of Rockford*, 408 U.S. 104, 114 (1972). Indeed, this Court "ha[s] not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Because the ordinance does not infringe on any First Amendment interests, and violates no other specific provision of the Constitution, its mere breadth cannot serve as a basis for facial invalidation.

In any event, the Chicago Police have prepared detailed guidelines for the enforcement of the ordinance, which eliminate any difficulty the broad language of the ordinance itself might pose. Pet. App. 64a-73a. The court below rejected those guidelines on the ground that "[i]t is the duty of the lawmakers to establish minimal guidelines to govern law enforcement." Pet. App. 16a. But nothing in our Constitution governs the manner in which States, or local governments, allocate their legislative functions. *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 612-613 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself"); *Dreyer* v. *Illinois*, 187 U.S. 71, 83-84 (1902) (due

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court below did not see any significance distinction between the two doctrines. *See* Pet. App. 8a, 12a-13a. The ordinance at issue in *Shuttlesworth*, however, made it a crime "to stand *or* loiter upon any street or sidewalk . . . after having been requested by any police officer to move on." 382 U.S. at 90. The Court's concern was primarily with the blanket prohibition on "standing" on a public street, which was permeated "with [an] ever-present potential for arbitrarily suppressing First Amendment liberties." *Id.* at 90-91. Indeed, the Court noted that the ordinance had been narrowed since the events in that case. Once the ordinance was narrowed to apply to loiterers who obstructed free passage and "refused to obey a request by an officer to move on," the Court could "not say that the ordinance is unconstitutional." *Id.* at 91.

process does not require separation of state powers). This Court frequently looks to administrative constructions in determining whether state statutes are vague. *See, e.g., Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court *or enforcement agency* has proffered") (emphasis added).

The police guidelines were adopted not only to narrow the breadth of the ordinance, but to avoid any possibility of arbitrary enforcement: "In order to ensure that the anti-gang loitering is not enforced in an arbitrary or discriminatory way, this directive [establishing the guidelines] establishes limitations on the enforcement discretion of Department members, and thereby provides for enforcement of the ordinance in a fair and principled way." Pet. App. 65a. Even a cursory review of the numerous and detailed discretion-guiding provisions of the police guidelines demonstrates that officers on the street have less discretion in enforcing the ordinance than they do, for example, in enforcing the traffic laws. The Court must presume that the police officers who enforce the gang-loitering ordinance, and the prosecutors and courts who will thereafter review those officers' work, will do so fairly. *See, e.g., United States* v. *Mezzanatto*, 513 U.S. 196, 210 (1995); *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).

3. The questions presented are important, and the decision below reflects profound confusion in the lower courts regarding the constitutionality of community policing laws. "[C]ourts have reached conflicting results in several recent cases assessing facial vagueness challenges to the efforts of legislatures and city councils to fashion new forms of police authority to deal with neighborhood problems," including prohibitions on loitering. Livingston, *supra*, at 558. Loitering statutes are upheld in some jurisdictions and struck down in others. *Compare, e.g., E.L.* v. *State*, 619 So. 2d 252 (Fla. 1993) (holding loitering ordinance unconstitutional), *with*,

e.g., *City of Tacoma* v. *Luvene*, 827 P.2d 1374 (Wash. 1992) (sustaining constitutionality of similar ordinance); *see* Pet. 14-16 & nn. 9-12.

The Chicago gang-loitering ordinance is only one of many legislative implementations of the new community policing methods. Yet the Illinois Supreme Court held, erroneously, that the Chicago ordinance is unconstitutional. The decision below casts doubt on the constitutionality of a broad range of community policing laws, and will deter other cities and States from experimenting with reducing crime by controlling disorder. Other courts, by contrast, have sustained the constitutionality of restrictions similar to those imposed by the Chicago ordinance. *See People ex rel. Gallo* v. *Acuna*, 929 P.2d 596 (Cal. 1997) (rejecting constitutional challenges to injunction prohibiting gang-related conduct), *cert. denied*, 117 S. Ct. 2513 (1997).[14]

Indeed, a comprehensive review of this area of the law indicates a "confused pattern of decisions," an "erratic and confusing body of case law," an "overall pattern of decisions" that is "erratic, fractured, and confusing," an "erratic pattern of the vagueness cases in this area," and a "problem posed by the fractured case law." Livingston, *supra*, at 561, 610, 628, 629, 631. The lower courts have reached conflicting results in considering the limits the Constitution places on increased police interaction with the community in an effort to redress relatively low-level street crime and disorder.

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[14] The *Acuna* court upheld, as against vagueness, overbreadth and First Amendment challenges (among others), an injunction that prohibited gang members from "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public with" any other gang members. 929 P.2d at 608. The Supreme Court of California's judgment can scarcely be reconciled with the conclusions reached by the Supreme Court of Illinois here, given that injunctions are generally tested under *more stringent* constitutional requirements than ordinances. *See Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753, 764-765 (1994).

The source of the confusion among the lower courts is this Court's decision in *Papachristou*. The Court in that case struck down a Florida loitering statute as void for vagueness, but gave little guidance as to how the vagueness doctrine, or other constitutional restraints, should be applied in reviewing public order laws. "Disparate results in later cases were the predictable outcome." Livingston, *supra*, at 628. Courts reviewing the constitutionality of community policing laws have reached differing results depending on the breadth they ascribe to the ruling in *Papachristou*.

Many courts, including the Illinois Supreme Court, have given *Papachristou* an extraordinarily expansive reading, striking down even narrowly tailored laws designed to enhance public safety. This approach not only is fundamentally at odds with this Court's modern approach to due process, but also unnecessarily hampers state and local governments in their efforts to reduce crime by implementing community policing standards. Legislative bodies across the country increasingly are turning to the new policing methods, recognizing that frequent interaction between the police and the community is not only necessary but desirable.

Chicago's gang-loitering ordinance, for example, sprang from the demands of the City's residents—primarily from poor, minority communities—to rid their neighborhoods of the drive-by shootings, fighting, and drug dealing that attend criminal street gangs. It was passed by an overwhelming margin by the City Council, with crucial support from aldermen representing the most crime-ridden areas. And the Chicago ordinance is hardly unique: "Loitering legislation in the 1990s has often had broad community support, particularly in some predominantly-minority communities plagued by street-level drug dealing." Livingston, *supra*, at 623. The residents of such communities understand full well that the kids the police can't order off the streets today are the same ones who will be taken off to jail tomorrow, if they are not taken to the emergency room or the morgue first.

This case presents an ideal vehicle for this Court to resolve the constitutionality of loitering laws and other similar efforts to reduce crime by policing disorder. A decision from this Court on the constitutionality of Chicago's ordinance would provide needed guidance not only to the Illinois courts, but also to courts and legislatures across the Nation that are considering the legal ramifications of the new policing. The Illinois Supreme Court expressly recognized that "[c]riminal street gangs are an expanding cancer in our society and their illegal activities endanger the safety of many law-abiding citizens." Pet. App. 17a. Yet, through a transparently fallacious analysis of this Court's cases, the court below disabled the citizenry of Illinois from dealing effectively with that "cancer." Only this Court's intervention can restore uniformity to this important area of federal constitutional law, which, perhaps more than any other, touches the day-to-day lives of our citizenry. This Court should grant certiorari to declare firmly that the Due Process Clause does not prevent the people from reclaiming their communities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 9, 1998

APPENDIX

Groups Comprising *Amici Curiae*
Chicago Neighborhood Organizations

The Resurrection Project
United Neighborhood Organization
West Woodlawn Council of Block Clubs
Hegwisch Community Committee
Chicago Roseland Coalition for Community Control
South Chicago Chamber of Commerce
Ravenswood Community Council
Nobel Neighbors
Hermosa Community Organization
Reach Out and Touch Ministries
West Humboldt Park Family and Community
Development Council

Supreme Court, U.S.
FILED
JUN 19 1998
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(10)

No. 97-1121

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CITY OF CHICAGO,
Petitioner,

v.

JESUS MORALES, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR THE PETITIONER

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61 pp

QUESTIONS PRESENTED

1. Whether a loitering ordinance authorizing the arrest of persons who have disobeyed a police order to move on, given when a police officer has reasonable cause to believe that a group of loiterers contains a member of a criminal street gang, is impermissibly vague in violation of due process guarantees.

2. Whether, despite legislative findings about the deleterious effects of loitering by criminal street gangs, an ordinance that requires a group of loiterers containing criminal street gang members to obey a police order to move on abridges rights secured by the rubric of substantive due process.

In addition, in one of the briefs in opposition to the petition for certiorari, respondents presented one additional question not subsumed in the preceding questions:

3. Whether a loitering ordinance that makes it illegal for loiterers to disobey an order to disperse, issued when a police officer reasonably believes that a group of loiterers includes members of a criminal street gang, authorizes unreasonable seizures in violation of the Fourth Amendment.

PARTIES TO THE PROCEEDING

The petitioner is the City of Chicago. The respondents are persons arrested under Chicago's Gang Loitering Ordinance: James Youkhana, Fernando O. Cota, Jose A. Merced, Roosevelt McMullan, Jr., Johnny R. Newsome, Anthony D. Cordero, Julio M. Barroso, Hermie J. Khamo, Lamont J. Jordan, Lisa Gonzales, Florentine Soto, Renee Goodwill, Tasha White, Sabrina Brown, Gregorio Guiterrez, Sandy Garvin, Raul Jimenez, Jr., Daniel Washington, Jose Renteria, Jesus Morales, Malcolm Ramsey, Neil Round, Christopher Lostroscio, Casey A. Mazeika, Karl T. Kelly, Jesse K. Paschke, Roy Delgado, Jr., Japheth Estrada, Jorge Lopez, Wladyslaw W. Jedrol, James J. Portway, Michael A. Horton, Paris Bryant, Wesley Saffold, Eric Jones, Roshindaj Bryant, Leroy Minley, Jr., Eric Warren, Charlie Monden, Joseph Dell, Tywan Durnell Riley, Eric Miller, Jerry Cunningham, Eric Dennis, Vernon Diggs, Deandre Fitzpatrick, Darryl Hall, Cornelius Holt, Jonathan Lewis, Seth Lewis, Steve Reynolds, Claude Ross, Dushone Scott, Michael Simmons, Chester Sparks, Clarence Taylor, Michael Taylor, Stacey Wilson, Gabriel Ruiz, Maximilano Orozco, Ricardo Florez, Anibal Hernandez, Pablo Estrada, Juan Cruz, Andres Feliciano, and Peter Quinones.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1121

CITY OF CHICAGO,

Petitioner,

v.

JESUS MORALES, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (Pet. App. 1a-19a) is reported at 177 Ill. 2d 440, 687 N.E.2d 53 (1997). The opinion of the Illinois Appellate Court in *City of Chicago v. Youkhana* (Pet. App. 20a-36a) is reported at 277 Ill. App. 3d 101, 660 N.E.2d 34 (1995). The opinions of the appellate court in *City of Chicago v. Morales* (Pet. App. 37a-38a) and *City of Chicago v. Ramsey* (Pet. App. 39a-40a) are unreported. The opinion of the Circuit Court of Cook County in *City of Chicago v. Youkhana* (Pet. App. 41a-59a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on October 17, 1997. The petition for certiorari was filed on January 5, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.[1]

[1] The opinion of the Illinois Supreme Court invalidated the Chicago gang loitering ordinance under the Due Process Clauses of

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

The First Amendment provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. The Fourth Amendment provides, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. The Due Process Clause of the Fourteenth Amendment provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1. The Chicago gang loitering ordinance is set out in the appendix to the petition for a writ of certiorari (Pet. App. 60a-63a).

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both the federal and state Constitutions. The text of these provisions is virtually identical. Compare U.S. Const. amend. XIV, § 1 with Ill. Const. art. I, § 2. In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court held that when the decision of a state court rests "primarily" on or is "interwoven" with federal law, this Court may exercise jurisdiction unless the opinion of the state court contains a "plain statement" that "clearly and expressly" indicates that its judgment rests on an adequate and independent state ground. *Id.* at 1041. The Court has consistently hewed to this rule in cases in which a state court relies on both federal and state law to support its judgment. See, *e.g.*, *Pennsylvania v. Labron*, 518 U.S. 938, 941 (1996) (per curiam); *Arizona v. Evans*, 514 U.S. 1, 7-10 (1995); *New York v. Class*, 475 U.S. 106, 109-10 (1986). In the decision below, the Illinois Supreme Court expressly invoked federal law and relied primarily on this Court's decisions in invalidating Chicago's gang loitering ordinance. See, *e.g.*, Pet. App. 7a, 17a. And even though respondents brought the holding of *Long* to the Illinois Supreme Court's attention and asked it to make an express statement that any judgment invalidating the gang loitering ordinance would rest on an adequate and independent state ground, there is no plain statement in its opinion that the court's judgment rests on an adequate and independent state ground. Thus, this Court has jurisdiction to review the judgment below.

STATEMENT

The enactment of Chicago's gang loitering ordinance followed hearings before the Chicago City Council's Committee on Police and Fire exploring the problems that criminal street gangs present for the people of Chicago—in particular the problems created by public loitering by gang members.[2] At the hearings, witnesses described how criminal street gang members loiter as part of a strategy to organize as a group, recruit new members, claim territory, and antagonize rival gangs and others. Supp. R. I at 121, 125; Supp. R. II at 32. Further testimony explained the inadequacy of existing laws to address this problem. Residents may complain to police of illegal gang activity in progress, but once the police arrive, gang members and their cohorts will not commit any overt criminal act; instead, they will appear to be simply loitering. Supp. R. I at 50-51, 68, 79-80, 138-40; Supp. R. II at 33, 38. The testimony also showed that community residents are often afraid to file formal complaints, serve as witnesses, or take other steps necessary to prosecute criminal activity because of concerns for their own safety or the safety of their family members or property. Supp. R. I at 50, 52, 54, 69, 108-09, 135; Supp. R. II at 22-25, 37, 40. There was also testimony reflecting the need for a method of prosecuting gang members that does not require law-abiding persons to place themselves in harm's way by testifying, even if they are willing to do so. Supp. R. II at 24-25.

Perhaps most important, the testimony before the City Council disclosed that criminal street gangs are menancing and destructive regardless of whether their members are, at a particular moment, violating other laws. The intimidating presence of gangs itself has a palpable detrimental effect on a family's sense of well being, on the willingness of parents to allow their children outside, and

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[2] The transcripts of the hearings were lodged with the trial court in each case and were then added as a supplemental record ("Supp. R.") on appeal by stipulation.

on the willingness of Chicago residents to remain in the City. Supp. R. I at 53, 62, 93, 95, 110, 132, 138; Supp. R. II at 167.

Based on this testimony, the City Council, in the preamble to the ordinance, made the following findings:

> WHEREAS, in many neighborhoods throughout the City the burgeoning presence of street gang members in public has intimidated many law abiding citizens; and
>
> WHEREAS, one of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas; and
>
> WHEREAS, members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know police are present, while maintaining control over identifiable areas by continued loitering; and
>
> WHEREAS, the City Council has determined that loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity . . . .

Pet. App. 60a-61a. The ordinance provides:

> Whenever a police officer observes a person he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

Pet. App. 61a. "Loiter" is defined as "to remain in any one place with no apparent purpose." *Ibid.* The ordinance also contains a comprehensive and precise definition of "criminal street gang." Pet. App. 61a-62a.[3]

[3] "Criminal street gang" is defined as "any ongoing organization, association in fact or group of three or more persons, formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in [the ordinance's definition of "criminal gang activity"], and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." Pet. App. 61a-62a. "Criminal gang activity" and a "pattern of criminal gang activity" as defined in the ordinance (Pet. App. 62a, 63a), largely track the definition of an "enterprise" and a "pattern of racketeering activity" in the federal racketeering statute. See 18 U.S.C. § 1961.

A violation of the ordinance is punishable by up to 6 months imprisonment, a $500 fine, and up to 120 hours of community service. Pet. App. 63a. It is a defense to a prosecution under the ordinance that "no person who was observed loitering was in fact a member of a criminal street gang." Pet. App. 61a.

During the hearings, representatives of the Departments of Law and Police informed the City Council that the Chicago Police Department would promulgate regulations for the ordinance that would guide its enforcement by the police. Supp. R. II at 185, 220. Chicago Police Department General Order 92-4 was later promulgated to govern enforcement of the gang loitering ordinance.

The General Order permits enforcement of the ordinance only in areas of the City designated by a district commander because "the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community." Pet. App. 68a. The Order also provides specific criteria and objective standards for defining criminal street gangs, and that such gangs will be identfied only on the basis of "specific documented and reliable information" such as crime pattern information, surveillance results, witness interviews, admissions of street gang members, or information from informants of proven reliability. Pet. App. 66a-67a. The Order further explains how membership in a criminal street gang can be established. The Order requires probable cause to believe that an individual is a member of a criminal street gang (Pet. App. 71a-72a), and probable

cause, in turn, must be substantiated by the arresting officer's "experience and knowledge of the alleged offenders," and corroborated by "specific, documented, and reliable information," such as an individual's admission of membership, an individual's display of distinctive colors, tattoos, or markings not ordinarily worn by persons other than criminal street gang members, the use of distinctive signs or symbols, or statements by a witness of proven reliability or whose statements can be independently corroborated. Pet. App. 67a-68a. Only members of the gang crime section and other specially designated personnel may make arrests under the ordinance. Pet. App. 65a.[4]

After the ordinance became effective, numerous prosecutions of individuals for violating its proscriptions ensued, and various trial judges issued conflicting rulings on the constitutionality of the ordinance. In *City of Chicago v. Youkhana*, which became the first case to reach the Illinois Appellate Court, the defendants moved to dismiss the criminal cases against them on the ground that the ordinance was unconstitutional on its face. The circuit court granted that motion in a written opinion. Pet. App. 41a-59a.

On December 18, 1995, the appellate court affirmed. The court made four separate holdings of facial unconstitutionality on federal grounds: the ordinance infringes constitutionally protected rights of speech and assembly because it "gives the police power to order dispersal and arrest those who associate with gang members in public places" (Pet. App. 26a); it is unconstitutionally vague because it "fail[s] to establish . . . guidelines" for its enforcement (Pet. App. 33a); it "unconstitutionally criminalizes a person's status" because it is directed at loitering by gang members (*ibid.*); and it "jeopardizes the rights

[4] Under the General Order the Gang Crimes Section must maintain and disseminate files reflecting the names of persons who the Department has probable cause to believe are members of criminal street gangs. Pet. App. 70a-71a. The files are reviewed semi-annually to ensure that they remain current. *Ibid.*

guaranteed under the fourth amendment" because it "seems to us to be a transparent attempt to avoid the probable cause requirement" (Pet. App. 35a). Following that decision, on December 29, 1995, the appellate court consolidated all appeals the City had taken in other cases in which a trial court had declared the ordinance to be unconstitutional, and affirmed on the strength of *Youkhana* in an opinion captioned *City of Chicago v. Ramsey* (Pet. App. 39a-40a). Also on that date, the appellate court consolidated all appeals from judgments of conviction under the ordinance, and reversed the judgments on the strength of the decision in *Youkhana* in an opinion captioned *City of Chicago v. Morales* (Pet. App. 37a-38a).[5]

[5] The evidence supporting the convictions was as follows:

The arresting officer observed respondent Gutierrez loitering with two other men. Gutierrez Tr. 8-9, 12. Gutierrez had previously admitted to the officer that he belonged to the Latin Kings. *Id.* at 11-12, 13-14. The officer ordered the group to disperse, and when the officer returned after driving around the block, the loiterers were in the same place, and were arrested. *Id.* at 12-13, 18-19.

The arresting officer saw respondent Washington and several others standing on the street and yelling. Washington Tr. 10, 17. He approached the group, and several persons in it admitted that they were Vice Lords. *Id.* at 11, 16-17. The officer ordered them to disperse. *Id.* at 11. The officer returned later, saw the same youths, and again ordered them to disperse. *Id.* at 11, 18. He returned still later, saw the same group, and arrested them. *Id.* at 12, 18-19.

The arresting officer observed respondent Renteria with the other persons loitering on a corner. Renteria Tr. 16-18. The arresting officer knew that the gang card file for the Satan Disciples contained a card identifying Renteria as a gang member. *Id.* at 14-15. Renteria also admitted to the officers that he was a street gang member. *Id.* at 27. The officer ordered the group to leave. *Id.* at 18, 23-24, 25-26. When she returned 15-20 minutes later, Renteria was still on the corner, and she arrested him. *Id.* at 16-17, 19, 24, 25-26.

Respondent Garvin stipulated to the arresting officer's testimony that he had been loitering with two other persons, they were ordered to move on based on his admission to the officer that he was

The City filed petitions for leave to appeal to the Illinois Supreme Court from the appellate court's judgments. In addition, the City moved the appellate court to issue a certificate of importance in *Youkhana*.[6] On February 27, 1996, the appellate court issued the certificate of importance. On April 3, 1996, the Illinois Supreme Court granted the petitions for leave to appeal in *Morales* and *Ramsey*, and consolidated them with the *Youkhana* appeal.

On October 17, 1997, the Illinois Supreme Court affirmed the judgments of the appellate court on two grounds. First, the court concluded that the gang loitering ordinance was impermissibly vague. The court wrote that the ordinance fails to give persons fair notice of what conduct is prohibited by "mak[ing] criminal activities which by modern standards are normally innocent" (Pet. App. 9a (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972)), and employs language—the term "loitering"—that "is inadequate to inform a citizen of its criminal implications" (Pet. App. 9a). As for the ordinance's requirement that a police officer reasonably believe that a group of loiterers includes a member of a

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a member of the Latin Kings and his tattoos, and that Garvin failed to obey the order. Garvin Tr. 9.

Respondent Jimenez stipulated that the allegations in the complaint against him—that he was a known member of the Ambrose gang, and that he remained in a known location for gang activity after being ordered to disperse—were correct. Jimenez R. C.2; Jimenez Tr. 3-4.

Finally, the arresting officer observed loitering by six individuals he believed to be gang members, including respondent Morales. Morales Tr. 6-8. Morales admitted at trial that he knew that he was with members of the Gangster Disciples. *Id.* at 19. The officer ordered the loiterers to move on, but when he returned 5-10 minutes later they were still present, and he arrested them. *Id.* at 11.

[6] The Illinois Supreme Court has mandatory jurisdiction in cases in which the appellate court has issued a certificate of importance. See Ill. Const. art. VI, § 4(c); Ill. Sup. Ct. R. 316. Its exercise of jurisdiction in cases on petition for leave to appeal is discretionary. See Ill. Sup. Ct. R. 315.

criminal street gang, the court concluded that this "depends solely on the police officer's subjective evaluation of the facts of the situation in light of his own experience." Pet. App. 12a. Similarly, the prerequisite that loiterers disobey an order to move on before they can be arrested failed to save the ordinance because "[m]erely adding the element of refusing to obey an order by police to disperse does not elevate the gang loitering ordinance to such a level that it provides adequate notice of proscribed conduct." Pet. App. 13a. The court also concluded that the ordinance permitted arbitrary and discriminatory enforcement by conferring "unfettered discretion in the police to determine whether a suspect's conduct has violated the ordinance." Pet. App. 15a.

Second, the court determined that the gang loitering ordinance offends substantive due process. Again relying on *Papachristou*, the court concluded that the freedom to loiter, while not expressly protected by the Constitution, is constitutionally protected as one of the "amenities of American life." Pet. App. 17a. The court also determined that a prohibition on loitering infringes the "right to travel," the "right of locomotion," the "right to freedom of movement," and "the general right to associate with others." Pet. App. 18a. This deprivation of constitutionally protected liberty was "utterly unreasonable," since it deprived "[p]ersons suspected of being in criminal street gangs . . . of the personal liberty of being able to freely walk the streets and associate with friends, regardless of whether they are actually gang members or have committed any crime." *Ibid.*

SUMMARY OF ARGUMENT

Surely no one could doubt the magnitude of the problem that gang crime poses for many of our Nation's cities. And as the findings of the Chicago City Council make clear, part of that problem can be traced to the ability of street gang members and their cohorts to loiter with impunity. A collection of brazen, disorderly and visibly law-

less persons on the public ways intimidates residents, detracts from property values, and ultimately destabilizes communities. The gang loitering ordinance and similar laws give the authorities a way to address this type of civil disorder. Such laws achieve an important prophylactic objective as well—because when police officers can order gang members to move along, they can prevent crime before it occurs.

The Illinois Supreme Court invalidated the gang loitering ordinance on its face as impermissibly vague and inconsistent with substantive due process. Neither of these doctrines, however, prevents state and local governments from taking the modest yet important step of authorizing police officers to move loiterers along before they commit some other crime or otherwise harm their communities.

The first step in assessing a facial challenge to a law "is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982) (footnote omitted). This is the overbreadth doctrine, which permits facial invalidation of a challenged enactment only when it proscribes a substantial amount of conduct protected by the First Amendment. *E.g., United States v. Salerno*, 481 U.S. 739, 745 (1987). The gang loitering ordinance, however, is not directed at First Amendment rights of speech, assembly, or association. It concerns only "loitering," which the ordinance defines as "remain[ing] in any one place with no apparent purpose." Pet. App. 61a. Accordingly, this restriction on "loitering" will rarely, if ever, apply to protests, picketing, or other protected conduct, since such activities by their very nature will nearly always have an "apparent purpose." The ordinance instead will reach at most persons engaged in mere casual social interaction—those with no apparent purpose—and this Court has firmly rejected the notion that the Constitution secures any generalized right of "social association." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). In any event, even if the gang

loitering ordinance were deemed on its face to regulate speech, assembly, or association, it would be permissible regulation of the time, place, and manner of such activities under the test announced in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

When a criminal law challenged for vagueness does not reach a substantial amount of constitutionally protected conduct, it will be upheld as long as it "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). On the first prong of this test, no one who has been given a police order to move along could fail to understand what is required of him, and under our ordinance, no arrest can be made unless there is first a police order and then a refusal to comply with that order. Indeed, when it comes to providing notice to potential offenders, a law requiring disobedience of a police order before an arrest can be made is the antithesis of vague: people are told precisely what they must do to avoid arrest.

The second prong requires that the challenged law "provide explicit standards for those who apply them." *Hoffman Estates*, 455 U.S. at 498. The gang loitering ordinance contains express standards for its enforcement, since it requires disobedience of an order to disperse, and it permits officers to issue such an order only if the officer "reasonably believes" that a group of loiterers contains a member of a criminal street gang. In *Kolender*, the Court acknowledged that a loitering law would be valid if it authorized investigative stops based on "reasonable suspicion" because this standard provides "neutral limitations on the conduct of individual officers." 461 U.S. at 361. If "reasonable suspicion" is an appropriately neutral limitation on an officer's authority to detain loiterers, requiring an officer to have a reasonable basis to identify a loiterer as a gang member before issuing an enforceable order to move on is surely a permissible neu-

tral limitation as well. The concept of membership in a criminal street gang is not so amorphous that it precludes objectively based enforcement decisions; there are many objective indicia of membership in a criminal street gang, such as an individual's admissions, his display of distinctive signs or of symbols, the existence of information from a reliable informant, or the like. Moreover, the decision to target gang loitering itself was neither arbitrary nor discriminatory—gang loitering poses special problems, and thus appropriately became subject to special restrictions.

As for substantive due process, neither this Court's precedents nor principles of sound constitutionalism support a fundamental right to loiter. In fact, history and tradition point the other way—there is a considerable legacy in our country of regulating loitering. And when, as here, an enactment infringes no fundamental liberty, it need only be rationally related to a legitimate governmental interest. *E.g., Washington v. Glucksberg,* 117 S. Ct. 2258, 2271-72 (1997).

The gang loitering ordinance easily passes this test. It infringes the "liberty" to use the public ways only to a limited extent—even known gang members can loiter alone, and they can loiter with others as long as they move along when ordered. While the Illinois Supreme Court was troubled that the ordinance was not limited in its scope to persons loitering to engage in illegal activity, the mere potential for a prophylactic enactment to reach "innocent" conduct does not give rise to a substantive due process violation. Here, the City Council reasonably concluded that it was necessary to address a visibly lawless and destabilizing type of loitering on the public ways. The Council identified a particular circumstance in which loitering jeopardizes legitimate governmental interests and authorized the police to disperse loiterers in that circumstance. Because the authority to disperse loiterers in such circumstances is rationally related to legitimate governmental objectives, it does not offend substantive due process.

Finally, we address an alternate ground to invalidate the ordinance respondents have pressed—that it authorizes arrests on suspicion in violation of the Fourth Amendment. This submission is belied by the plain terms of the ordinance. Under the ordinance, no one can be arrested until they have disobeyed a police order; at that point, of course, an arrest is based on violation of a police order, not merely "suspicion." And there is nothing in the Fourth Amendment that prohibits an order to loiterers to move along. Such an order is not even subject to attack under the Fourth Amendment, since it does not physically restrain the person who receives it and hence is not a "seizure" subject to Fourth Amendment review. See, *e.g., California v. Hodari D.,* 499 U.S. 621, 626 (1991). In any event, there is nothing "unreasonable" within the meaning of the Fourth Amendment about granting the police authority to enforce an order to move on by arrest as long as the order itself is authorized by an otherwise valid police power measure.

ARGUMENT

Criminal street gangs, as the Illinois Supreme Court recognized, "are an expanding cancer in our society and their illegal activities endanger the safety of many law-abiding citizens." Pet. App. 17a.[7] Among the problems posed by gangs are those engendered when gangs can loiter with impunity on the public ways. The findings of the Chicago City Council, which the Illinois Supreme Court did not question, explain that loitering by street gang members and their hangers-on poses at least two kinds of problems. First, although gang members bla-

[7] That assessment is widely shared. See generally, *e.g.,* Carolyn Rebecca Block & Richard Block, *Street Gang Crime in Chicago* (Nat'l Inst. of Justice Dec. 1993); G. David Curry, Richard A. Ball & Scott H. Decker, *Estimating the National Scope of Gang Crime from Law Enforcement Data,* in *Gangs in America* 21-36 (C. Ronald Huff ed. 1996); U.S. Department of Justice, *Attorney General's Report to the President: A Coordinated Approach to the Challenge of Gang Violence: A Progress Report* (April 1996).

tantly engage in drug deals and other crimes on the public ways in full view of neighborhood residents, they stand about pretending to be loitering innocently once the police arrive. Second, the very presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways intimidates residents, who become afraid even to leave their homes and go about their business. That, in turn, imperils community residents' sense of safety and security, detracts from property values, and can ultimately destabilize entire neighborhoods.

The Illinois Supreme Court correctly observed that "[m]any of the offensive activities the city claims the gang loitering ordinance will deter are already criminal acts." Pet. App. 19a. But surely it is no answer to law-abiding residents, who no longer feel safe when they go outdoors, to wait for someone to eventually be incarcerated as a result of a conviction on a serious felony charge—if proof beyond a reasonable doubt can be assembled from the testimony of witnesses willing to cooperate and able to remain alive until the time of trial. And even apart from whether loitering facilitates the commission of other crimes, it can destabilize communities as a consequence of the very presence of these menacing groups on the public ways. Loitering laws, by granting the police the authority to move a visibly lawless and often dangerous element away from law-abiding persons, thus provide an important alternative to more conventional and reactive policing—by moving gang members along, police officers can restore order to the streetscape and stop crime before it occurs. Without them, the police must wait for a breach of the peace, often having tragic consequences, and then hope that they can secure convictions. And by enabling the police to demonstrate control over the streetscape and the most lawless elements in the community, loitering laws make people feel safer, thereby reinvigorating neighborhoods.

The importance of loitering and other public order laws has been underscored by the emergence of commu-

nity-oriented policing and its theoretical underpinning—the "Broken Windows" thesis first advanced by Professors James Q. Wilson and George Kelling. These scholars observed that in the wake of the professionalization of policing in the 1950s and 1960s, law enforcement had stressed strategies based on investigating those crimes thought to be most serious, thereby overlooking the important function that public order maintenance served. See James Q. Wilson & George L. Kelling, *Broken Windows,* Atlantic Monthly, Mar. 1982, at 33-38.[8] The "Broken Windows" thesis is that crime is most effectively combatted when the police can address signs of visible disorder—including loitering—that destabilize communities and stimulate the commission of more serious crimes. See *id.* at 31-33.[9] As Professor Kahan has observed: "Norms of order are critical to keeping social influence pointed away from, rather than toward, criminality; the spectacle of open gang activity, vandalism, aggressive panhandling, and other forms of disorder transmits signals that cause both law-breakers and law-abiders to behave in ways conducive to crime." Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence,* 83 Va. L. Rev. 349, 391 (1997) (footnote omitted). In light of these insights, commentators have repeatedly called for courts to provide greater leeway for state and local governments to address signs of chronic disorder on the streets.[10]

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[8] See also, *e.g.*, George L. Kelling & Catherine M. Coles, *Fixing Broken Windows* 71-107 (1996); Charles R. Swanson, Leonard Territo & Robert W. Taylor, *Police Administration: Structures, Processes and Behavior* 3-29 (3d ed. 1993); Samuel Walker, *The Police in America* 12-29 (1992).

[9] See also, *e.g.*, Kelling & Coles, *supra* at 16-36; Wesley G. Skogan, *Disorder and Decline* 9-10, 51-57, 73-75, 85-124 (1990); Jerome H. Skolnick & David H. Bayley, *Community Policing: Issues and Practices Around the World* 4-19 (Nat'l Inst. of Justice 1988).

[10] See, *e.g.*, Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows and Public Space Zoning,* 105 Yale L.J. 1165, 1177-84, 1238-46 (1996); Kahan, *supra* at 389-94; Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing,*

These theories have been validated on the streets of Chicago. In the period of time during which the gang loitering ordinance was enforced (before the appellate court's decisions in this case), we estimate that some 45,000 orders to disperse were issued under the ordinance and obeyed, and nearly the same number of arrests were made of those who failed to move on after being ordered to do so. Removing a visibly lawless element, whose very presence on the public ways was often viewed by rival gangs as an invitation to violence, had a substantial effect on the level of gang-related violence in Chicago. In 1995, for example, the last year in which the ordinance was enforced, gang-related homicide in Chicago dropped 26%, a considerably steeper decline than the 9% drop in the overall homicide rate that year. But in 1996, without enforcement of the ordinance, while the overall homicide rate fell another 4%, the level of gang-related homicide jumped 7%.[11] Perhaps it is just this simple: if fewer

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97 Colum. L. Rev. 551, 650-72 (1997); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 Am. Crim. L. Rev. 191, 218-27 (1998).

11 These figures can be found in a five-year report by the Police Department of the City of Chicago entitled *Gang and Narcotic-Related Crime: 1993-1997*, which has been lodged with the Court and served on counsel for respondents. The homicide percentages in the report have changed slightly from those we reported in our petition because the results of investigations completed in 1997 of homicides ocurring in 1996 have become available, enabling the motive of some homicides to be reclassified. As the report reflects, this pattern of substantial decline in gang-related crime followed by an increase after enforcement of the ordinance ceased was observed for a variety of other types of gang-related crimes. The report also shows that, in every year, at least 92% of all gang-related homicides were committed outdoors. The report further reflects, for 1997, a decline in gang-related homicides but a continued increase in both gang-related aggravated battery with a firearm and drive-by shootings. Based on the available empirical evidence, at least one scholar has offered her tentative view that enforcement of the gang loitering ordinance appeared to combat gang crime effectively. See Meares, *supra* at 224-26.

gang members are loitering in public where they constitute an inviting target for their rivals, fewer of them—and innocent people nearby—will be shot to death.

Nevertheless, in the decision below, the Illinois Supreme Court found Chicago's ordinance to be impermissibly vague and inconsistent with substantive due process on its face because it does not exclude from its scope persons engaged in "innocent" activities. See Pet. App. 10a, 17a-18a. In our view, these holdings are inconsistent with the unquestioned power of legislatures to enact prophylactic laws that criminalize conduct, like standing around, that may be innocent in isolation, but that is unacceptably likely, under at least some circumstances, to give rise to substantive evils within the power of government to address. We now explain why this is so.

I. THE GANG LOITERING ORDINANCE IS NOT IMPERMISSIBLY VAGUE.

Laws that are claimed to have been framed with insufficient precision can be attacked on their face under two different doctrines. First, the overbreadth doctrine permits facial invalidation of laws that impermissibly inhibit the exercise of First Amendment rights. *E.g., Gooding v. Wilson*, 405 U.S. 518, 521 (1972). Second, even a law that does not reach such protected conduct may be impermissibly vague because it fails to establish sufficient standards to guide the police and public. *E.g., Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). Accordingly, "a court's first task is to determine whether an enactment reaches a substantial amount of constitutionally protected conduct. If it does not, the overbreadth challenge must fail. The court should then examine the facial vagueness challenge . . . and should uphold the challenge only if the enactment is impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982) (footnote omitted). We thus turn to that two-part inquiry.

A. The Gang Loitering Ordinance Is Not Overbroad.

"The general test of vagueness applies with particular force in review of laws dealing with speech." *Hynes v. Mayor and Council*, 425 U.S. 610, 620 (1976). The overbreadth doctrine excepts laws that implicate First Amendment rights from the general rule that only laws incapable of any valid application can be struck down on their face. See *United States v. Salerno*, 481 U.S. 739, 745 (1987). Even so, not every law that has the potential to reach conduct protected by the First Amendment is facially invalid. To the contrary, an enactment should not "be held invalid on its face merely because it is possible to conceive of a single impermissible application. . . ." *City of Houston v. Hill*, 482 U.S. 451, 458 (1987) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 630 (1973) (Brennan, J., dissenting)). Rather, to invalidate a challenged law on this basis, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *New York v. Ferber*, 458 U.S. 747, 770 (1982) (quoting *Broadrick*, 413 U.S. at 615).[12] The gang loitering ordinance, as we now explain, passes this test.

1. The gang loitering ordinance does not proscribe speech, assembly, or association.

Respondents have claimed in this litigation that the gang loitering ordinance proscribes conduct within the ambit of the First Amendment's protection for speech, assembly, and association, and even convinced the state intermediate appellate court on this point (Pet. App. 24a-27a). In fact, however, this ordinance is directed at loitering, pure and simple; and loitering, at least as defined in this ordinance, does not qualify as speech, assembly, or association within the meaning of the First Amendment.

[12] Accord, *e.g.*, *Osborne v. Ohio*, 495 U.S. 103, 112 (1990); *Board of Airport Commissioners v. Jews For Jesus, Inc.*, 482 U.S. 569, 574 (1987); *City of Houston v. Hill*, 482 U.S. at 459.

First, the gang loitering ordinance is not directed at "speech"; indeed, the ordinance applies whether or not loiterers are speaking. The ordinance is concerned only with "loitering," which it defines as "remain[ing] in any one place with no apparent purpose." Pet. App. 61a. The guaranty of free speech simply does not embrace a claim of right to remain in any one place on the public ways—even if one's purpose is to talk to someone else. This Court held as much in *Colten v. Kentucky*, 407 U.S. 104 (1972). Colten was convicted of disorderly conduct because, while trying to intercede with a police officer on behalf of a friend who was getting a traffic ticket, he disobeyed a police officer's order to move on. The Court upheld his conviction, explaining: "we have little doubt that Colten's conduct in refusing to move on after being directed to move on was not, without more, protected by the First Amendment." *Id.* at 109. Our ordinance also punishes loiterers only when they have refused to move, and not on the basis of their speech. And, of course, the fact that people may speak to each other as they loiter does not confer upon their loitering a First Amendment immunity from regulation: "[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Accord, *e.g.*, *Cox v. Louisiana*, 379 U.S. 536, 555-56 (1965).

Nor does the ordinance proscribe freedom of assembly. The term "assembly" connotes a purposeful gathering and not one with "no apparent purpose." In fact, the Court has made clear that the right to assemble does not protect persons merely because they are standing in proximity to each other. Instead, an assemblage is protected under the First Amendment only when the gathering is itself a "method[] of expression. . . ." *Shuttlesworth v.*

City of Birmingham, 394 U.S. 147, 152 (1969). In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), for example, the Court assumed that individuals who sought to sleep in a public park as part of a protest against homelessness could advance a First Amendment claim only because "the demonstration [wa]s expressive conduct protected to some extent by the First Amendment." *Id.* at 293 (footnote omitted). Similarly, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995), the Court held that a St. Patrick's Day parade enjoyed First Amendment protection because people were to assemble as "a form of expression. . . ." *Id.* at 568. This ordinance, however, will rarely if ever reach that type of assemblage. Public speeches, leafleting, demonstrations, picketing, and other expressive activities will almost always be outside the scope of the ordinance by its terms, since these activities will almost always have an "apparent purpose." After all, the entire point of such activities is to convey a message to others—only an unusually ineffectual demonstration will have no "apparent purpose." Indeed, neither of the state appellate courts construed the ordinance to reach demonstrations or other overtly expressive activities.

The final right that respondents have invoked, "freedom of association," is not expressly protected by the Constitution. For this reason, the right to associate is protected only in two senses: when undertaken for the purpose of engaging in activities otherwise protected by the First Amendment, such as "speech, assembly, petition for the redress of grievances, and the exercise of religion," *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984), or when undertaken to engage in "intimate human relationships" that attend to the "creation and sustenance of a family—marriage; childbirth; the raising and education of children; and cohabitation with one's relatives," *id.* at 617, 619 (citations omitted). Accord, *e.g., Board of Directors v. Rotary Club*, 481 U.S. 537, 544 (1987). Thus, like assembly, association is entitled to constitutional protection only when individuals gather for a particular and

protected purpose. This ordinance infringes neither type of protected association. As we have just explained above, it is not directed at speech or assembly within the meaning of the First Amendment. As for intimate associative rights, there is little that is "intimate" about loitering in public. To the contrary, loitering in public plainly is not "the kind of private or personal relationship . . . accorded protection under the First Amendment" because the right of "intimate association" does not extend to "activities carried on in the presence of strangers." *Rotary Club*, 481 U.S. at 547.

Indeed, this Court has held that laws that restrict the ability of persons to gather together in public, but that do not proscribe anything that can be characterized as primarily expressive activity, do not abridge rights of speech, assembly, or association. In *City of Dallas v. Stanglin*, 490 U.S. 19 (1989), this Court upheld an ordinance regulating youth dances even though it prevented older persons from attending dances with younger ones. The Court rejected the claim that "the Constitution recognizes a generalized right of 'social association,'" and concluded that the ordinance at issue "impinges on no constitutionally protected right." *Id.* at 25. The conduct regulated by the ordinance, the Court held, was simply not sufficiently expressive to be entitled to First Amendment protection. The Court wrote: "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernal is not sufficient to bring the activity within the protection of the First Amendment." *Ibid.* Cf. *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").[13]

[13] Of course, laws regulating social gatherings affect a liberty interest, and thus are subject to review under the rubric of substantive due process. See *Stanglin*, 490 U.S. at 28 (Stevens, J., concurring in the judgment). See also *Swank v. Smart*, 898 F.2d

For their part, respondents have relied on the hypothetical possibility that the ordinance could occasionally be applied to persons who appear to the police to be loitering even though they are actually engaged in protected activity, such as a community organization's employee when counseling gang members. See, *e.g.*, Pet. App. 56a-57a. Plainly this hypothesis does not amount to substantial overbreadth. Persons providing counseling or engaged in other protected activities are a tiny fraction of all those the police will encounter standing in public, and those engaged in such activities will usually have a purpose apparent to any police officer. Surely a law directed at loitering is far more likely to be applied to persons engaged in the kind of casual social interaction the Court held to be unprotected in *Stanglin* than to someone engaged in gang outreach or similarly protected activities. Indeed, after the many thousands of arrests under the ordinance, this record reflects not a single instance in which anyone—including the 66 respondents—was arrested, or even ordered to move on, while engaged in political canvassing, planning a demonstration, providing religious or social counseling, or doing anything else protected by the First Amendment.[14]

As we explain above, merely being able to imagine a hypothetical application of a challenged enactment that would be impermissible does not make for substantial overbreadth. In *New York v. Ferber*, for example, the Court was quite clear on this point. While acknowledging that the child pornography statute at issue could conceiv-

1247, 1251-52 (7th Cir.), cert. denied, 498 U.S. 853 (1990). We address that doctrine in Part II below.

[14] In fact, because this ordinance proscribes only remaining in one place after being ordered to move rather than what persons can say or write, there is great doubt whether it is even subject to attack as overbroad. At least one circuit has concluded that laws directed at what is generally conduct with no inherently expressive purpose can never be invalidated as overbroad. See *Roulette v. City of Seattle*, 97 F.3d 300, 303-05 (9th Cir. 1996) (upholding ordinance prohibiting sitting or lying on sidewalks).

ably be applied to "some protected expression, ranging from medical textbooks to pictorials in the National Geographic," the Court refused to assume without proof that "these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach." 458 U.S. at 773. See also, *e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 488 (1988); *Regan v. Time, Inc.*, 468 U.S. 641, 651-52 (1984) (plurality opinion); *Broadrick*, 413 U.S. at 616-18. Here there is no reason to believe that anything other than the tiniest fraction of those subject to this ordinance will be engaged in counseling, canvassing, or other protected activities.[15]

Rather than finding that the ordinance would frequently reach persons engaged in protected advocacy activities, the state appellate court found it overbroad because it could proscribe the conduct "of innocent non-gang members," such as "someone waiting with a friend or a family member for a ride to the grocery store. . . ." Pet. App. 26a-27a. But of course, the First Amendment is concerned with "speech" and other expressive activities, not innocence. As *Stanglin* makes clear, a variety of casual social interactions may be "innocent," but that does not

[15] The gang loitering ordinance, which confines its scope to conduct with "no apparent purpose," contrasts sharply with laws that this Court has condemned as overbroad. In *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), for example, the ordinance at issue made it a crime for "three or more persons to . . . conduct themselves in a manner annoying to persons passing by." *Id.* at 611. The Court held this ordinance invalid, reasoning that activity protected by the First Amendment is often annoying and hence the ordinance could reach virtually any demonstration, picketing, or public assembly. See *id.* at 615-16. Similarly, in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), the ordinance made it "unlawful for any person to stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on." *Id.* at 90. By effectively granting police officers the authority to prevent anyone from standing still in Birmingham, the ordinance plainly could reach picketing and demonstrations, and hence created an "ever-present potential for arbitrarily suppressing First Amendment liberties . . . ." *Id.* at 90-91.

make them protected by the First Amendment.[16] A potential for application of this ordinance to "innocent" activity accordingly does not render it overbroad.

2. The gang loitering ordinance is a permissible regulation of loitering.

Even if the gang loitering ordinance reached activities that qualified as speech, assembly, or association, that would not seal its fate. As we explain above, a law is overbroad only when it "reaches a substantial amount of constitutionally *protected* conduct" (*Hoffman Estates*, 455 U.S. at 494 (emphasis supplied)), and, of course, not all speech, assembly, or association is constitutionally protected. To the contrary, there is ample power to regulate such activities. It has been clear since at least *United States v. O'Brien*, for example, that when " 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental restrictions on First Amendment freedoms." 391 U.S. at 376. Thus "[t]he First Amendment does not bar application of a neutral regulation that incidentally burdens speech . . . ." *United States v. Albertini*, 472 U.S. 675, 688 (1985). It has also been clear since at least *Cox v. New Hampshire*, 312 U.S. 569 (1941), that the First Amendment permits reasonable regulation of the time, place, and manner of speech, public assemblies, and other forms of association. Accordingly, even laws that expressly proscribe entirely peaceful expressive conduct are frequently upheld. See, *e.g.*, *Frisby v. Schultz*, 487 U.S. at 481-87 (prohibition on residential picketing); *Community For Creative Non-Violence*, 468 U.S. at 293-99

[16] The California Supreme Court has taken precisely this approach, concluding that a civil injunction prohibiting gang members from associating together in public infringed at most the kind of generalized social associations held to be unprotected in *Stanglin*. See *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1110-12, 929 P.2d 596, 608-09, 60 Cal. Rptr. 2d 277, 289-90, cert. denied, 117 S. Ct. 2513 (1997).

(prohibition on sleeping in public park as part of a protest).

The test for evaluating incidental restrictions on speech and assembly "is little, if any, different from the standard applied to time, place, or manner restrictions." *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (quoting *Community For Creative Non-Violence*, 468 U.S. at 298). Such laws are upheld when they are not based on the content of expression, when they are narrowly tailored to promote a substantial governmental interest, and when they leave open adequate alternative channels for communication. *E.g.*, *Rock Against Racism*, 491 U.S. at 791-800; *Frisby v. Schultz*, 487 U.S. at 481-82. Essentially the same test governs laws claimed to infringe the right of association: "Infringement on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedom." *Roberts*, 468 U.S. at 623. The gang loitering ordinance satisfies this test.

First, the ordinance is content-neutral. "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 643 (1994). Legislation is accordingly content-neutral if it is "justified without reference to the content of the regulated speech." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (citations and internal quotations omitted). The gang loitering ordinance is classically content-neutral. The requirement that loiterers move on when ordered to do so has nothing to do with the content of the speech that may pass among them as they loiter—or even whether they are speaking at all—it is applicable to all who loiter in public. Like the ordinance prohibiting the posting of signs on municipal lightposts upheld in *Members of the City Council v. Taxpayers For Vincent*, 466 U.S. 789 (1984), this enactment is "neutral—indeed it is silent—concerning any

speaker's point of view. . . ." *Id.* at 804. Instead, as the Chicago City Council made clear in the ordinance's preamble, the justification for the gang loitering ordinance flows from the devastating effect that loitering by criminal street gang members and their associates has on the people living nearby—people who fear for their own safety, their families, their property, their neighborhoods, and their businesses. And "a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not on others." *Rock Against Racism*, 491 U.S. at 791.

Second, the ordinance is narrowly tailored to achieve important governmental interests. Surely no one could doubt the importance of the interests that the gang loitering ordinance is intended to serve. It exceeds by many orders of magnitude the types of governmental interests that have been held sufficient to support restrictions on First Amendment activity. See, *e.g.*, *Turner Broadcasting*, 512 U.S. at 662-64 (promoting free and high quality competitive cable television service); *Rock Against Racism*, 491 U.S. at 796 (restricting volume of music at concerts in a public park); *Taxpayers For Vincent*, 466 U.S. at 807 (reducing visual clutter caused by signs).

The ordinance is also narrowly tailored to promote these interests. Narrow tailoring does not require the least restrictive means for promoting the government's interests. *E.g.*, *Turner Broadcasting*, 512 U.S. at 662; *Rock Against Racism*, 491 U.S. at 798. Rather, a regulation is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799 (quoting *Albertini*, 472 U.S. at 689). "So long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that a government's interest could be adequately served by some less-speech-restrictive alternative." *Rock Against Racism*, 491 U.S. at 800.

Here, the findings of the City Council make clear that this ordinance is likely the most efficacious way of addressing the problem at issue. The evidence before the City Council established that gang members do not commit other offenses in the presence of police officers and that it is problematic to prosecute them for offenses committed outside the presence of police officers because such cases will necessarily require the testimony of civilian witnesses. The Council also found that loitering by gang members and those who join them has itself become a problem for communities because the presence of a visibly lawless element terrifies residents, invites violence, drives down property values, and otherwise tends to destabilize communities, and that these problems are not adequately addressed by existing laws. And while the legislature's findings are not conclusive when the record contains genuine disputes of fact on the efficacy of a regulation restricting First Amendment activity (*e.g.*, *Turner Broadcasting*, 512 U.S. at 665-68), this record contains no evidence or even an offer of proof from any respondent that there were means available to the City to address the problems engendered by gang loitering in some significantly less restrictive way that would still be as effective—and plainly the testimony before the City Council amply supported its finding that existing laws were inadequate to the challenge posed by gang crime.

Finally, the ordinance leaves open alternative channels for communication. Under the ordinance, gang members remain free to protest, picket, solicit contributions for their gangs, conduct a leafleting campaign, or engage in any other of the innumerable types of expressive conduct that has an "apparent purpose." Gang members also remain free to associate with each other and anyone else indoors or outdoors if they walk instead of loiter together; and they remain free to loiter outdoors as well, either alone, or in groups as long as they obey orders to move on.

Moreover, in evaluating the facial validity of challenged enactments, administrative regulations and guidelines for enforcement should be considered. See *Rock Against*

Racism, 491 U.S. at 795-96. Under General Order 92-4, the gang loitering ordinance is not enforced throughout Chicago, but only in those limited areas designated by police district commanders as "areas in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community." Pet. App. 68a. Thus, in most areas of the City, the ordinance has no effect on the activities of gang members and their associates.[17]

In short, there remain many—indeed innumerable—opportunities available to gang members to express their ideas and to associate with others. They are required to refrain from no more than remaining in place after having received a police order to move along. Accordingly, whether or not an ordinance directed at loitering can be said to regulate conduct that qualifies as speech, assembly, or association within the ambit of the First Amendment, this ordinance does not impermissibly impinge upon anything protected by that Amendment.

B. The Gang Loitering Ordinance Contains Appropriate Standards For Its Enforcement.

As we explained at the outset of this discussion, when a challenged enactment does not reach a substantial amount of constitutionally protected conduct, it should be invalidated on its face only if it is vague in all its applications. To invalidate an enactment for this reason, it must be

[17] The Illinois Supreme Court questioned whether General Order 92-4 had been followed uniformly, observing that respondent Morales was arrested based on a police officer's determination that he was a gang member that, in turn, was based solely on the fact that he was wearing black and blue clothing, in violation of the restrictions on such determinations contained in the General Order. See Pet. App. 16a & n.1. In fact, as we explain below, the court appears to have misconstrued the record on this point. See *infra* at 34 n.21. But in any event, the court's observation goes only to the question whether the standards in the order for identifying gang members have been consistently applied. There is no indication in this record that the ordinance has been enforced in any but those areas designated under General Order 92-4.

vague "in the sense that no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). By contrast, when "a penal statute define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement," *Kolender v. Lawson*, 461 U.S. at 357, the requisite specificity is present. Thus, this doctrine has two prongs, focusing "on actual notice to citizens and arbitrary enforcement . . . ." *Id.* at 358. There is no constitutional infirmity on either prong here.

1. The ordinance provides fair notice of what it prohibits.

Due process requires that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Hoffman Estates*, 455 U.S. at 498 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). The gang loitering ordinance easily satisfies this test. No one who has been given a police order to move on could fail to understand what is required of him, and under our ordinance, no arrest can be made unless there is first a police order to disperse and then a refusal to comply with that order. On this point, *Colten v. Kentucky* should be dispositive. As we note above, Colten had attempted to debate a police officer while the officer was issuing a traffic ticket to Colten's friend and then disobeyed the officer's order to move along. See 407 U.S. at 106-07. The Court upheld the Kentucky disorderly conduct statute under which Colten had been convicted against a vagueness attack, noting that anyone "should understand that he could be convicted . . . if he fails to obey an order to move on." *Id.* at 110. Since the statute required disobedience of a police order, it was "sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." *Ibid.*

The Illinois Supreme Court thought that the gang loitering ordinance failed to provide the requisite notice

because of its use of the term "loitering." See Pet. App. 9a-11a. Of course, if the term "loitering" were so vague that people ordinarily cannot tell when they are violating the law, all loitering laws would fall. There is no justification for so radical a conclusion. The ordinance straightforwardly defines the term "loiter" as "to remain in any one place with no apparent purpose" (Pet. App. 61a), and surely persons of common intelligence can grasp the concept of remaining in one place, as opposed to moving along, and can judge as well when one's purpose for staying put is not obvious to others who may come along.[18] There may be some imprecision in the concept of loitering, but of course "we can never expect mathematical certainty from our language." *Grayned*, 408 U.S. at 110 (footnote omitted). See also *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 577-79 (1973).

In any event, the Illinois Supreme Court ultimately acknowledged that there is "a common and accepted meaning of the word 'loiter,'" but added that this "term by itself is inadequate to inform a citizen of its criminal implications." Pet. App. 9a. Even if it is true that persons do not generally know when loitering can subject the loiterer to sanctions, this problem is also solved by the requirement that police officers order a group of loiterers to move on and by authorizing arrest only if this order is disobeyed. As we explain above, no one who has been given a police order to move on could fail to understand what is required of him. This point also addresses the Illinois Supreme Court's related concern that "[p]eople with entirely legitimate and lawful purposes will

[18] Indeed the better-reasoned decisions in the lower courts conclude that the term "loitering" has a common sense meaning that reasonable persons can apprehend. See, *e.g.*, *Wiemerslage v. Maine Township High School District 207*, 29 F.3d 1149, 1152 (7th Cir. 1994); *People v. Superior Court*, 46 Cal. 3d 381, 390-92, 758 P.2d 1046, 1049-50, 250 Cal. Rptr. 515, 518-19 (1988); *State v. Armstrong*, 282 Minn. 39, 42, 162 N.W.2d 357, 360 (1968).

not always be able to make their purposes apparent to a police officer." Pet. App. 10a. While this may occasionally be the case, people will always receive actual notice that they are required to move along before they are subject to arrest. And as *Colten* illustrates, the requirement of fair notice does not entitle persons to debate police officers on the propriety of their orders, or even to receive an explanation for the issuance of an order. Nor does it grant anyone a right to disobey police orders merely because his intentions may be good. At least when people are not engaged in constitutionally protected conduct, they are expected to obey the directives of police officers on pain of arrest.[19]

In the same vein, the Illinois Supreme Court also concluded that the gang loitering ordinance "fails to distinguish between innocent conduct and conduct calculated to cause harm and 'makes criminal activities which by modern standards are normally innocent.'" Pet. App. 9a (citation omitted) (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972)). Again, whatever problem is created by a law that criminalizes conduct people normally believe to be innocent is solved when persons receive actual notice from a police order of what they are expected to do. And for just that reason, the vagueness problem in the *Papachristou* case on which the Illinois Supreme Court primarily relied was quite different. The vagrancy ordinance at issue in *Papachristou* was so broadly written that it reached any person walking anywhere in Jacksonville at night, at least if the person did so on more than one occasion. See 405 U.S. at 163. Thus, the Court reasoned, virtually anyone could fall into this "vagrancy net." *Ibid.* That reasoning does not reach

[19] Perhaps the Illinois Supreme Court's concern that the ordinance could be applied to persons with legitimate purposes was not an objection on grounds of vagueness, since the police order makes it perfectly clear what one must do to comply with the law, but instead was a substantive due process concern that the ordinance transgresses the constitutional limitations on the municipal police power. We address that issue in Part II below.

the gang loitering ordinance, which requires actual notice to loiterers of what is required before they are subject to arrest.[20]

To be sure, the Illinois Supreme Court was correct that if police officers are afforded standardless discretion to order individuals to move on, the mere fact that a police order is given does not serve to sustain the order. See Pet. App. 12a-14a. As the court below recognized, dicta in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), indicates that an ordinance granting the police discretion to order anyone standing on a sidewalk to move on would be impermissibly vague. The Court's concern, however, was not lack of fair notice, but rather that the ordinance could be used against First Amendment activities and authorized the police to act arbitrarily and discriminatorily. See *id.* at 90-91 & n.5. That concern is not present here; we explain above that orders issued under this ordinance do not reach conduct protected by the First Amendment, and we address the question of standards for enforcement in Part I.B.2 below. The *Shuttlesworth* dicta thus does not preclude use of a police order as a means of providing fair notice to the public. Indeed, an ordinance requiring disobedience of a police order before an arrest can be made is the antithesis of vague: people are told precisely what they must do—move along—to avoid arrest.

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[20] This same point also distinguishes another case cited by the court below, *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). There, the Court invalidated a statute making it a crime to belong to a "gang," which had been construed to mean any group of two or more persons with no lawful purpose but without any requirement that the group be engaged in criminal activity. See *id.* at 456-57. The Court invalidated the statute because it failed to provide sufficient notice to the class of persons subject to its prohibition. See *id.* at 457-58. Here, of course, under the gang loitering ordinance, actual notice is provided to persons before they become subject to arrest.

2. The ordinance does not authorize arbitrary or discriminatory enforcement.

Due process also requires that "laws must provide explicit standards for those who apply them." *Hoffman Estates*, 455 U.S. at 498 (quoting *Grayned*, 408 U.S. at 108). This principle mandates that "a legislature establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)). The requirement that laws contain enforcement standards is designed to ensure that the authorities are not authorized to conduct " 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " *Kolender*, 461 U.S. at 358 (quoting *Smith*, 415 U.S. at 575). The ordinance considered in *Shuttlesworth*, for example, flunked this test because it contained no standards for when police could order someone standing on a public way to move on. See 382 U.S. at 90-91.

On this basis, enactments that are enforced based on the wholly subjective judgments of police officers should be condemned. For example, the statute at issue in *Kolender* required a loiterer to provide "credible and reliable" identification to a police officer, and thereby permitted officers to make inherently subjective credibility determinations about a suspect's identification. This left "virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute. . . ." 461 U.S. at 358. See also *Coates*, 402 U.S. at 614 (ordinance prohibiting "annoying" conduct was impermissibly vague because it depended on a police officer's subjective reactions and accordingly "no standard of conduct is specified at all"). But a law that "sets forth objective criteria" for enforcement should be upheld. See *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 526 (1994). The gang loitering ordinance specifies such objective standards.

First, under the plain meaning of the term "loitering" used in the ordinance, it does not permit officers to issue

any type of order to anyone who is moving along or who has an apparent purpose. Second, the ordinance permits no arrest if individuals have dispersed after having received a police order. These two limitations mean that enforcement is based on what a police officer actually observes, and not on inherently subjective assessments of a suspect's intent or credibility.

Third, and most important, the ordinance contains an expressly objective test for the propriety of an order directing loiterers to move—when the officer "reasonably believes" that the group contains a member of a criminal street gang. Pet. App. 61a.[21] This facially objective standard for enforcement unambiguously cabins discretion. And permitting police officers to act based only on their objectively reasonable beliefs is sufficient to address vague-

[21] General Order 92-4 construes the ordinance to require probable cause to believe that a loiterer is a member of a criminal street gang, and there are rigorous standards for determining membership. Pet. App. 67a-68a, 71a-72a. Such administrative guidelines for enforcement are appropriately considered in evaluating claims of vagueness. See, *e.g.*, *Kolender*, 461 U.S. at 355; *Hoffman Estates*, 455 U.S. at 494 n.5. The Illinois Supreme Court questioned the efficacy of General Order 92-4, stating that it had made "a thorough examination of the record" and had concluded that police officers "had not followed the guidelines of the general order in a uniform manner." Pet. App. 16a (footnote omitted). The single example the court cited—that respondent Morales was arrested solely because he was wearing blue and black clothing (Pet. App. 16a n.1)—in fact discloses a misunderstanding of the record. Morales was not arrested because of the colors he was wearing; he was arrested because the loiterers admitted that they belonged to a criminal street gang. See Morales R. C.3. And the trial judge who later convicted Morales found that he had admitted that he was loitering with a member of a criminal street gang, although he denied belonging to the gang. Morales Tr. at 19, 22. In any event, the Illinois Supreme Court's observation, even if correct, considers the record in only one of these 66 consolidated cases, which are themselves a tiny fraction of the cases brought under this ordinance, and surely cannot be taken as a finding that General Order 92-4 has been ignored. There has been no evidentiary hearing on the Chicago Police Department's adherence to the General Order, nor has any state court made an express finding of fact on this point.

ness concerns. In *Kolender*, for example, the Court explained that a loitering ordinance would be valid if it authorized investigative stops based on reasonable suspicion of criminal activity under the standard announced in *Terry v. Ohio*, 392 U.S. 1 (1968), since this standard provides "neutral limitations on the conduct of individual officers." 461 U.S. at 361 (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)). The *Terry* test, of course, is an objective one, even though the police must form their own judgments based on their reasonable beliefs when applying it. And if the *Terry* "reasonable suspicion" standard is an appropriately neutral limitation on an officer's authority to detain loiterers, then surely requiring an officer to have a reasonable basis to identify a loiterer as a member of a criminal street gang is an equally neutral limitation on the power to order loiterers to move on.

Police officers thus do not receive "unfettered discretion" under this law, as the Illinois Supreme Court claimed (Pet. App. 16a), but instead must have an objectively reasonable basis on which to identify a loiterer as a member of a criminal street gang. Certainly there is nothing about the concept of membership in a criminal street gang so amorphous and subjective that it is impossible to have objectively based beliefs on this point. In fact, gangs frequently have a quite coherent structure and methods of recruitment and admission.[22] Many jurisdictions have even made gang membership an element of an offense or a basis for sentencing enhancement, and vagueness attacks on such enactments have repeatedly been rejected.[23] As

[22] See, *e.g.*, Jeffrey Fagan, *Gangs, Drugs and Neighborhood Change*, in *Gangs in America* 42-73 (C. Ronald Huff ed. 1996); Martin Sanchez Jankowski, *Islands in the Street: Gangs and American Urban Society* 37-100 (1991); Irving A. Spergel, *The Youth Gang Problem: A Community Approach* 70-109 (1995).

[23] See, *e.g.*, *People v. Gardeley*, 14 Cal. 4th 605, 623-24, 927 P.2d 713, 724-25, 59 Cal. Rptr. 2d 356, 367-68 (1996), cert. denied, 118 S. Ct. 148 (1997); *Jackson v. State*, 634 N.E.2d 532, 535-36 (Ind. Ct. App. 1994); *Helton v. State*, 624 N.E.2d 499, 505-07 (Ind. Ct. App. 1993) cert. denied, 117 S. Ct. 1252 (1997); *State v. Walker*,

General Order 92-4 reflects, there are a variety of objective indicia of membership in a criminal street gang, such as an individual's admissions, his display of distinctive signs or symbols, or the existence of information from a reliable informant. See Pet. App. 67a-68a. In addition, the General Order provides that only specially trained and designated officers familiar with gang crime can make gang loitering arrests. See Pet. App. 65a.

Nor does vagueness doctrine prohibit laws that empower a police officer to issue an enforceable order based on his objectively reasonable belief. This Court approved just such a law in *Boos v. Barry*, 485 U.S. 312 (1988). In that case, the Court considered a vagueness attack on a law governing congregations near foreign embassies that had been construed to permit the police to order groups to disperse " 'only when the police reasonably believe that a threat to the security or peace of the embassy is present.' " *Id.* at 330 (quoting *Finzer v. Barry*, 798 F.2d 1450, 1471 (D.C. Cir. 1986)). The Court concluded that the statute, as construed, "withstands . . . vagueness challenge" because it contained a prohibition expressed "in words of common understanding." 485 U.S. at 332 (citations omitted). And permitting officers to act on their reasonable beliefs is hardly novel. The Fourth Amendment permits persons to be detained on a police officer's reasonable suspicion of criminal activity (*e.g.*, *United States v. Hensley*, 469 U.S. 221, 227-29 (1985)), and permits arrests based on probable cause, a standard requiring only "reasonably trustworthy information to warrant a prudent [person] in believing" that a crime has been committed (*e.g.*, *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam)). These standards necessarily rely

506 N.W.2d 430, 431-32 (Iowa 1993). An inventory of state laws that make gang membership an element of an offense or a basis for sentencing enhancement is contained in the Brief Amicus Curiae of Ohio, *et al.* And in *City of Tacoma v. Luvene*, 118 Wash. 2d 826, 827 P.2d 1374 (1992), the court rejected a vagueness attack on a loitering ordinance that permitted enforcement based on gang membership. See *id.* at 846-48 & n.12, 827 P.2d at 1384-86 & n.12.

on the reasonable beliefs of police officers. And under these standards, police officers have long relied on their reasonable beliefs to issue and enforce orders to persons that they encounter in public, as decisions such as *Colten v. Kentucky* illustrate.

Finally, there is nothing either arbitrary or discriminatory about the fact that this ordinance applies only to a particular class of individuals—members of criminal street gangs and those who loiter with them. In fact, it is well settled that the government may make an individual's membership in a class of potentially dangerous persons a basis for regulation, and the government may do this even if it could not constitutionally impose punishment based on membership in the class alone. Perhaps no case makes this clearer than *Lewis v. United States*, 445 U.S. 55 (1980), in which the Court upheld a statute prohibiting all convicted felons from possessing firearms, even if their convictions were uncounseled and hence unconstitutionally obtained, since there was a rational basis to deny all convicted persons access to firearms. See *id.* at 65-68.

Here, as we explain above, the legislature had an ample basis to believe that loitering by groups containing criminal street gang members posed special dangers to gang members themselves, innocent bystanders, and the surrounding community. Requiring such groups to move along when ordered is thus anything but arbitrary and discriminatory—in light of the City Council's findings on the dangers associated with loitering by and with gang members, it was plainly rational to limit this group's freedom to loiter, just as "Congress' judgment that a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of persons who should be disabled from dealing in or possesing firearms because of potential dangerousness [wa]s rational." *Lewis*, 445 U.S. at 67 (footnote omitted). See also, *e.g.*, *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (upholding statutory rape law proscribing sexual intercourse with females under age 18 not married to the accused); *DeVeau v. Braisted*, 363 U.S. 144 (1960) (upholding as an anti-

corruption measure disqualification of convicted felons from holding any position in waterfront union).

Certainly if a prosecutor targeted enforcement of a generally applicable law against gang members, a claim of improper selective prosecution would be rejected; the special dangers gangs pose would mean that such a policy was neither arbitrary nor discriminatory.[24] Here too, selecting gangs for special treatment is justified by the special challenges they pose for law enforcement. And for this reason as well, the ordinance considered in *Papachristou* again involved a far different problem. The Jacksonville vagrancy ordinance identified no discrete class of individuals who posed a threat to their communities, and hence there were "no standards governing the exercise of the discretion granted by the ordinance . . . ." 405 U.S. at 170. As we have explained, the same cannot be said of the gang loitering ordinance.

Of course, this ordinance will strike many as strong medicine. While persons with an apparent purpose—such as individuals waiting at a marked bus stop or playing basketball on a public court—are not subject to the ordinance, it is true that gang members and others with them who are merely sitting on a park bench, chatting on a sidewalk, or otherwise remaining in one public place for any other purpose not immediately discernable to a police officer, can be ordered to disperse. But while a law that requires persons to obey all police orders may be tough, it is surely not vague. The real objection to harsh laws is that they may not advance legitimate governmental interests. That, however, is a substantive due process objection, and not one of vagueness. It is thus to that issue that we next turn.

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[24] See, *e.g.*, *United States v. Turner*, 104 F.3d 1180, 1185 (9th Cir.), cert. denied, 117 S. Ct. 1566 & 1722 (1997); *United States v. Bourgeois*, 964 F.2d 935, 941 (9th Cir.), cert. denied, 506 U.S. 901 (1992); *United States v. Trent*, 718 F. Supp. 39 (D. Or. 1989). See generally *United States v. Armstrong*, 517 U.S. 456, 463-71 (1996); *Wayte v. United States*, 470 U.S. 598, 608-10 (1985).

II. THE GANG LOITERING ORDINANCE DOES NOT OFFEND SUBSTANTIVE DUE PROCESS.

The Illinois Supreme Court determined that the gang loitering ordinance was inconsistent with principles of substantive due process. As with all facial challenges not based on the First Amendment, this result can stand only if the ordinance is invalid in all its applications. See *Reno v. Flores*, 507 U.S. 292, 300-01 (1993). And as we explain below, substantive due process does not support the court's novel holding that the Constitution secures the right to stand still on the public way even when one is not engaged in speech, assembly, or other conduct that enjoys affirmative constitutional protection.

A. The Gang Loitering Ordinance Appropriately Advances Legitimate Governmental Interests.

Under substantive due process principles, a law that infringes no fundamental right or liberty interest need only be rationally related to a legitimate governmental interest. See, *e.g.*, *Washington v. Glucksberg*, 117 S. Ct. 2258, 2271-72 (1997); *Reno v. Flores*, 507 U.S. at 301-03. That is the test applicable here, since our Constitution recognizes no fundamental right to loiter.

As we explain above, the gang loitering ordinance infringes no right of speech, assembly, or association. Despite the Illinois Supreme Court's invocation of a "general right to associate with others" (Pet. App. 18a), we expain in Part I.A above why there is no such First Amendment right, and certainly no protected associational interest, in disobeying a police order to move along. The Illinois Supreme Court also invoked the "right to travel" and the "right of locomotion" (Pet. App. 18a), but these concepts are even more misplaced. The right to travel that this Court has recognized embraces the opportunity to travel abroad or from one state to another without facing unreasonable barriers as one leaves or enters a jurisdiction. See, *e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969) (right to travel between states); *Aptheker*

v. Secretary of State, 378 U.S. 500, 505-06 (1964) (right to travel abroad). The Court has never recognized a generalized right to walk wherever one wishes. Indeed, as we explain above, the Court's decisions in *Colten* and *Stanglin* refuse to recognize a right to go—or remain—wherever one wants. In any event, whatever protections the concept of substantive due process offers to those asserting the "right to travel" or the "right of locomotion," surely loitering is the antithesis of travel. If gang members and their associates only obey orders to move along when issued—exercising the very right to travel the Illinois Supreme Court supposed was infringed by the ordinance—they will not be subject to arrest.

Aside from its incorrect reliance on associational and travel rights, the Illinois Supreme Court relied on *Papachristou* for the conclusion that the right to loiter is one of the "amenities of American life." Pet. App. 17a. The *Papachristou* opinion, however, never states that some form of heightened judicial scrutiny is required of any regulation of loitering. And the Court should hesitate to create such a rule. In fact, "the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). This Court instead " 'exercise[s] the utmost care whenever we are asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court." *Glucksberg*, 117 S. Ct. at 2268 (citations omitted) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion)).

To assess a claim that a right or liberty interest should be treated as fundamental, "[o]ur Nation's history, legal traditions, and practices . . . provide the crucial 'guideposts for responsible decisionmaking' that direct and restrain our exposition of the Due Process Clause." *Glucksberg*, 117 S. Ct. at 2268 (citation omitted) (quoting

Collins, 503 U.S. at 125). The court below, however, identified no history, tradition, or practice of respecting a right to loiter. In fact, history and tradition are quite to the contrary. The drafters of the Model Penal Code, for example, comprehensively traced the history of loitering laws before recommending one of their own, and observed that such laws have a considerable pedigree—they were first enacted to help feudal lords control their serfs, later expanded as a means of controlling often dangerous bands of the unemployed, and ultimately were adopted in 49 states by statute and the remaining one by common law. See American Law Institute, *Model Penal Code* § 250.6, Comment 1 (1980).[25] The Model Penal Code itself recommends a prohibition on loitering under circumstances that reasonably warrant alarm for the safety of persons or property. See *id.* § 250.6 & Comment 3. Our ordinance, of course, is simply a more precise version of this model, since it specifies one particular circumstance in which the legislature found that loitering reasonably warrants alarm.

Nor can loitering laws fairly be characterized as "one of those 'arbitrary impositions' or 'purposeless restraints' at odds with the Due Process Clause . . . ." *Glucksberg*, 117 S. Ct. at 2275 (Souter, J., concurring in the judgment). Preserving legislative freedom to regulate loitering is, to the contrary, part of the community's basic entitlement to create a safe and secure environment for all. The judgment that anti-loitering provisions are useful in preventing crime is supported not only by the findings of

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[25] See also, *e.g.*, Jeffrey S. Adler, *A Historical Analysis of the Law of Vagrancy*, 27 Criminology 209 (1989); Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. Pa. L. Rev. 608, 615-31 (1956); Rollin M. Perkins, *The Vagrancy Concept*, 9 Hastings L.J. 237 (1958). The authority of police to issue orders to persons to move along as a means of keeping the peace is also deeply rooted. See, *e.g.*, Robert Force, *Decriminalization of Breach of the Peace Statutes: A Nonpenal Approach to Order Maintenance*, 46 Tul. L. Rev. 367, 392-404 (1972). An inventory of current state loitering and dispersal laws is found in the Brief Amicus Curiae of Ohio, *et al.*

the Chicago City Council, but, as we explain above, by the verdict of history and the substantial body of scholarly opinion that supports the "Broken Windows" thesis that underlies this and similar public order laws. And surely no one could doubt that the "general interest in preventing crime is compelling." *United States v. Salerno,* 481 U.S. at 750. The governmental interest in preserving, and indeed enhancing, the stability and desirability of urban neighborhoods is equally so: " '[T]he City's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect.' " *Taxpayers For Vincent,* 466 U.S. at 807 (brackets in original) (quoting *Young v. American Mini-Theatres, Inc.,* 427 U.S. 50, 71 (1976) (plurality opinion)). Thus, to circumscribe legislative power to enact loitering and similar public order laws would impinge upon critical governmental interests. Perhaps even worse, such a holding would disregard the famous admonition from Justice Brandeis: "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation." *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (dissenting opinion). Accord, *e.g., Cruzan v. Director,* 497 U.S. 261, 292 (1990) (O'Connor, J., concurring); *Chandler v. Florida,* 449 U.S. 560, 579-80 (1981).

Nor should it matter if loitering can be considered one of the "amenities of life." *Papachristou,* 405 U.S. at 164. In organized society, the "amenities" of some must sometimes be regulated for the benefit of the community as a whole. And in assessing such regulation, as the California Supreme Court observed while upholding a civil injunction against loitering by gang members, a court "begins with the acknowledgement that the interests of the community are not invariably less important than the freedom of individuals." *People ex rel. Gallo v. Acuna,* 14 Cal. 4th 1090, 1102, 929 P.2d 596, 603, 60 Cal. Rptr. 2d 277, 284, cert. denied, 117 S. Ct. 2513 (1997). This ordinance, of course, was enacted precisely because the intimidating

presence of gang members often prevents law-abiding persons from enjoying their own "amenities of life." And preserving the ability of the politically accountable branches of government to weigh the competing claims of different constituencies whose liberties may come into conflict is how we "maximize individual freedoms within a framework of ordered liberty." *Kolender,* 461 U.S. at 357.

Thus, to the extent that language in *Papachristou* suggests that loitering laws are suspect because they have the potential to reach conduct that can be innocuous in nature, this represents a brand of substantive due process that should surely be interred. Enactment of all prophylactic laws involves weighing the benefits of prevention against the cost of prohibiting conduct that is sometimes innocent. The Court has long recognized the propriety of legislation that proscribes particular conduct not because it is invariably malicious or even inappropriate, but rather because it is unacceptably likely to give rise to substantive evils within the power of government to prohibit. For example, in *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421 (1952), the Court sustained a law requiring employers to grant four hours paid leave on election days, since otherwise employers might use the power to withhold leave as a means of influencing their employees' votes. See *id.* at 423-25. Or, more recently, in *Glucksberg,* in the course of sustaining a prohibition on assisted suicide, the Court explained that, whatever the merits of assisted suicide, this prohibition advanced a legitimate interest in ensuring that the state not start "down the path to voluntary, and perhaps involuntary, euthanasia." 117 S. Ct. at 2274. Accord *id.* at 2290-93 (Souter, J., concurring in the judgment). And, as we observe above, in *Lewis* this Court upheld a prohibition on the possession of firearms by felons whose convictions were uncounseled, largely as a prophylactic measure.

Applying the correct test, it is plain that the gang loitering ordinance should be upheld as reasonably related to

legitimate government interests. As we explain above, the ordinance advances legitimate—indeed compelling—governmental interests by combatting the deleterious effects of gang loitering. Conversely, it infringes whatever liberty interest there is in using the public ways to a very limited extent—anyone can loiter alone, or even with others, including criminal street gang members, as long as they move along when directed to do so. Of course, we do not contend that the ordinance could never be applied to persons whose conduct may be in fact innocuous or inoffensive. But the benefits from removing a visibly lawless element of loiterers from the public ways—because loitering by gang members and those who join them destabilizes communities, facilitates criminal activity and gang recruitment, intimidates law-abiding residents, lowers property values, and places both gang members and those loitering with them at risk if rival gangs come along—surely could reasonably be thought to justify whatever burden is imposed on persons engaged in "innocent" activity who are directed to move along as a result of this ordinance. And whether the City Council could have crafted a narrower law is quite beside the point—under the rational basis test, the legislature is not required "to have chosen the least restrictive means of achieving its legislative end." *Heller v. Doe*, 509 U.S. 312, 330 (1993). See also *Reno v. Flores*, 507 U.S. at 305 ("narrow tailoring is required only when fundamental rights are involved").

In short, in this ordinance, the legislature identified a particular circumstance in which loitering jeopardizes legitimate governmental interests and authorized police officers to disperse loiterers in that circumstance. Because that authorization is rationally related to legitimate governmental interests, it should not have been set at naught in the name of substantive due process.

B. The Gang Loitering Ordinance Does Not Create A Status Offense.

Substantive due process, incorporating as it does the prohibition on "cruel and unusual punishments" contained

in the Eighth Amendment, forbids the imposition of criminal penalties based on an individual's status alone. For that reason, in *Robinson v. California*, 370 U.S. 660 (1962), the Court invalidated a statute making it a crime to be a narcotics addict. See *id.* at 666-68. In *Powell v. Texas*, 392 U.S. 514 (1968), however, the Court upheld a public drunkenness statute as applied to an alcoholic, making clear that even behavior persons are compelled to engage in by virtue of their status can be a basis for regulation as long as the law at issue requires that "the accused has committed some act, has engaged in some behavior, which society has an interest in preventing . . . ." *Id.* at 533 (plurality opinion). See also *id.* at 549-50 (White, J., concurring in the result). The gang loitering ordinance, of course, requires an affirmative act, and thus comports with this rule. In fact, two discrete types of conduct are required. Not only must someone first loiter, but he must then disobey an order to disperse.[26]

The intermediate state appellate court held that the ordinance created a status offense because the ordinance "can be triggered only when a gang member is found loitering." Pet. App. 34a. This feature, however, does not make for a forbidden status offense, but rather a special restriction on conduct by persons whose status warrants such a measure. And there is no constitutional prohibition against placing such a restriction on persons whose status warrants such measures, as long as it does not impose penalties based on status alone. Such measures are in fact common.

For example, statutory rape laws are based on the age and sometimes the sex of an individual. Similarly, federal law prohibits possession of firearms by convicted felons,

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[26] The lower courts have consistently held that loitering alone can constitute the required conduct. See, *e.g.*, *People v. Superior Court*, 46 Cal. 3d 381, 398, 758 P.2d 1046, 1054-55, 250 Cal. Rptr. 515, 523-24 (1988); *State v. Armstrong*, 282 Minn. 39, 43, 162 N.W.2d 357, 360, (1968); *City of Tacoma v. Luvene*, 118 Wash. 2d 826, 843-44, 827 P.2d 1374, 1382-83 (1992).

persons who illegally use or who are addicted to controlled substances, persons who have been adjudicated mentally ill or who have been committed to a mental institution, aliens unlawfully in the country, persons who have been dishonorably discharged from the armed forces, and persons who have renounced American citizenship. See 18 U.S.C. § 922(g). Under the appellate court's holding, presumably these laws would be invalid because they are "triggered" by the status of an individual. Yet such reasoning cannot be squared with decisions such as *Lewis*, which, as we explain in Part I.B.2 above, upheld the prohibition on possession of firearms by convicted felons even when applied to those whose convictions were unconstitutionally obtained, since they were in a class of persons that could rationally be viewed as potentially dangerous. Similarly, the gang loitering ordinance criminalizes not mere status but rather conduct by gang members and their associates that the City Council reasonably found to have a destructive impact on many communities—"public behavior which may create substantial health and safety hazards . . . and which offends the moral and aesthetic sensibilities of a large segment of the community." *Powell*, 392 U.S. at 532. For that reason, this ordinance does not create a forbidden status offense.

III. THE GANG LOITERING ORDINANCE DOES NOT OFFEND THE FOURTH AMENDMENT.

Finally, we address an alternate ground that respondents have continued to press for invalidating the gang loitering ordinance—that it violates the Fourth Amendment.[27] Indeed respondents persuaded the state appellate court that the ordinance authorized arrests without compliance with that Amendment's "probable cause requirement." Pet. App. 35a. That court concluded that the ordinance authorizes "[a]rresting a person on suspicion . . . ." *Ibid.* (quoting *Papachristou*, 405 U.S. at 169).

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[27] Respondents pressed this ground at each level in the state courts and have renewed it in this Court in defense of the judgment below. See Brief In Opposition of Respondents Youkhana and Cota at 23-24; Pet. App. 5a, 35a, 58a-59a n.9.

This is demonstrably incorrect—the plain terms of the ordinance make clear that it does not permit arrests based on "suspicion." Before loiterers can be arrested, this ordinance—unlike Jacksonville's vagrancy ordinance at issue in *Papachristou*—requires police officers to order loiterers to move on. Even then, no arrests can be made unless the order is disobeyed. At that point, of course, the officer is not acting on suspicion but on his own knowledge that his order has not been obeyed.

Perhaps the appellate court's concern was not that arrests could be made on suspicion, but rather that the underlying orders to move on could be given on suspicion. This also raises no Fourth Amendment problem. An order to move on is simply not subject to attack under the Fourth Amendment. Such an order is not a "seizure," to which that Amendment applies.

This Court has made clear that absent a "seizure" within the meaning of the Fourth Amendment, interaction between a police officer and an individual "implicates no Fourth Amendment interest." *Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984) (per curiam). A "seizure," in turn, occurs only when a "reasonable person would have believed that he was not free to leave," *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)), or at a minimum, when an individual would not reasonably feel free to "terminate the encounter" with the police, *Florida v. Bostick*, 501 U.S. 429, 436 (1991). In *California v. Hodari D.*, 499 U.S. 621 (1991), the Court applied this test and held that a police officer's order to halt—when not obeyed—is not subject to the Fourth Amendment. Rather, a "seizure" triggering the probable cause requirement occurs only when there is "application of physical force to restrain movement." *Id.* at 626. Accord *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) ("Violation of the Fourth Amendment requires an intentional acquisition of physical control."). An order to move on under the gang loitering ordinance, of course, involves no such

forcible restraint—indeed the opposite of forcible restraint—and thus is not a seizure.

Nor can an order to disperse be viewed as a "seizure" simply because the recipients' "freedom of movement" is limited to the extent that they must actually move. Such a boundless view of the Fourth Amendment would convert every traffic direction or every crowd control instruction from an officer to a pedestrian into a "seizure" subject to Fourth Amendment review. That expansive notion is, of course, not the law.[28]

In any event, even if an order to move along were a "seizure," it would still not violate the Fourth Amendment. We explain in Part II.A above why the City Council's decision to confer authority on police officers to order gang members and others who loiter with them to move along was reasonably related to legitimate governmental interests. And the Fourth Amendment, of course, proscribes only "unreasonable" seizures. Accordingly, the "touchstone of the Fourth Amendment is reasonableness." *Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996) (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)). If orders issued under this ordinance reasonably advance legitimate police powers, and we explain in Part II.A above why they do, then they cannot be viewed as constitutionally "unreasonable," any more than other orders an officer issues to persons as a reasonable exercise of the police power—such as a traffic direction or a crowd control instruction—are constitutionally unreasonable.

Thus the Fourth Amendment provides no independent basis to attack this ordinance. Indeed, the Fourth Amendment has always been understood to permit a police officer to "arrest a person when he has probable cause to believe

[28] Although the issue has not been frequently litigated, the Seventh Circuit has observed that directions from police officers at an accident scene or to a loiterer to move on do not implicate the Fourth Amendment. See *Kernats v. O'Sullivan*, 35 F.3d 1171, 1181 n.7 (7th Cir. 1994). See also *id.* at 1184 (Crabb, J., concurring).

that person has committed a crime." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). This classic restatement of the scope of the Fourth Amendment is of course silent about what types of conduct the government may make a crime. Instead its guarantee is procedural—to require only that there be probable cause to believe that some law has been broken before an arrest can be made. *Michigan v. DeFillippo*, 443 U.S. 31 (1979), illustrates the point. DeFillippo had been arrested under an ordinance that authorized police officers to stop individuals based on reasonable cause to believe some further investigation is warranted, and then required such individuals to identify themselves and produce evidence of their identity. See *id.* at 33-34. The state courts later held that the ordinance was impermissibly vague and hence unconstitutional (*id.* at 34), but this Court concluded that DeFillippo's arrest nevertheless comported with the Fourth Amendment. Because DeFillippo had violated the terms of the ordinance, "there was abundant probable cause to satisfy the constitutional prerequisite for an arrest." *Id.* at 37. After all, the Court explained, "[p]olice are charged to enforce laws until and unless they are declared unconstitutional." *Id.* at 38.[29]

Here, too, the Fourth Amendment poses no obstacle to enforcement of a duly enacted law. The gang loitering ordinance, of course, grants no authority to search and seize except when there is probable cause to believe that its terms have been violated—that an order to disperse has been properly given and disobeyed. If the Court accepts our submission that a requirement to obey police orders to move along can be validly placed on gang members

[29] See also, *e.g.*, *Waters v. Barry*, 711 F. Supp. 1125, 1137-38 (D.D.C. 1989) (Fourth Amendment permitted arrest under curfew ordinance regardless of its substantive constitutionality under the First and the Fourteenth Amendments); *City of Milwaukee v. Nelson*, 149 Wis. 2d 434, 454-62, 439 N.W.2d 562, 569-72 (as long as probable cause existed to believe defendant had loitered in violation of ordinance his arrest comported with the Fourth Amendment), cert. denied, 493 U.S. 858 (1989).

and their associates, then an arrest made on probable cause to believe that a duly authorized police order has been disobeyed does not offend the Fourth Amendment.

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

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IN THE
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OCTOBER TERM, 1997

CITY OF CHICAGO,

Petitioner,

v.

JESUS MORALES, et al.,

Respondents.

On Writ of Certiorari to the
Supreme Court of Illinois

MEMORANDUM OF THE PETITIONER IN OPPOSITION TO MOTION OF THE STATE OF OHIO TO PARTICIPATE IN ORAL ARGUMENT AND FOR DIVIDED AND EXPANDED ARGUMENT

At issue in this case is the constitutionality of the anti-gang loitering ordinance enacted by petitioner City of Chicago. The State of Ohio, joined by 32 other States and Territories, has filed a brief as amicus curiae in support of the petitioner pursuant to this Court's Rule 28.3, 28.4, and 28.7. Ohio now seeks additional time for oral argument and divided argument so that it may present argument as an amicus curiae. Petitioner opposes this request.

1. The interest of the State of Ohio and the other amici States and Territories is a limited one, and not one that justifies granting amici argument time, especially if this will reduce the time for argument available to petitioner. The Office of the Attorney General of Ohio does not claim that it has experience in enforcing any loitering or similar public order

law. Rather, public order laws are typically enforced locally, through local district attorneys or prosecutors, such as the office that represents the petitioner. Indeed, in their brief, amici do not claim to have experience with enforcement of any ordinance similar to the anti-gang loitering ordinance at issue here. In the statement of interest that introduces their brief, amici instead assert only that they "share Chicago's concerns about urban violence and community disfunction spawned by criminal gangs and share responsibility with their political subdivisions for rooting out these problems." Ohio Br. 1. In fact, amici acknowledge that they generally have responded to gang crime with a different approach, by enacting sentencing enhancement laws that have "targeted gang crimes for additional penalties." Id. at 3. And they also acknowledge that Chicago's approach is different from theirs: "in contrast to these other laws, the Chicago ordinance takes a more proactive stance toward law enforcement." Id. at 4. Amici add: "Instead of predictably increasing the sentences imposed for gang-related crimes, instead of building still-larger prisons to house the youths responsible for these actions, Chicago has tried to alter the community climate that allows gang activity to fester." Ibid.

2. The motion, for its part, attempts to justify participation in oral argument on the basis of what Ohio terms "the impact of this litigation on a broad range of State laws." Motion at 2. With all due respect to Ohio, these questions are of secondary import in this litigation. While the Court will

rightly be concerned with the effect of its decision in this case on other laws, any such impact will not be immediate enough to justify argument time in this case. As we explain above, neither the State of Ohio nor any other of the amici States and Territories administers a public order law similar to the City's ordinance. Of course, amici are interested in this case -- both for what it represents as an emerging crime control device and because some of the broadest arguments respondents have made could reach the various state laws that amici do administer. Yet given the differences between the ordinance and the state laws, the effect of any decision adverse to petitioner on state laws administered by amici is highly speculative, and in any event will be settled in future litigation, not in this case.

3. This indirect effect that a decision in this case is likely to have on the laws amici administer easily distinguishes the three cases Ohio cites to justify divided argument in this case. In City of Boerne v. Flores, 117 S. Ct. 2157 (1997), the Court considered the constitutionality of the Religious Freedom Restoration Act of 1993. In that case Ohio was permitted to argue that the Act was unconstitutional because the Act, in addition to constraining the powers of local governments, on its face also applied to and constrained the powers of the States, and thus, as Ohio claimed in its statement of interest, regardless of its constitutionality as applied to local governments, "disrupt[ed] several core functions of State government." The Court allowed a motion by the State of Ohio and

also granted the Solicitor General's motion for divided argument on the other side of the case. See 117 S. Ct. 762 (1997). Here, of course, the claims at issue do not directly implicate the administration of state laws, and in any event, Ohio raises no separate issue in this case regarding the scope of state as opposed to local police powers. Moreover, the Solicitor General does not present a contrary view here, but rather also supports the City of Chicago.

Edgar v. MITE Corp., 457 U.S. 624 (1982), involved the validity of a provision of Illinois' Business Takeover Act that required a tender offeror to notify the Secretary of State and the target company of its intent to make a tender offer and the material terms of the offer 20 business days before the offer becomes effective. See id. at 634-35. As the Court's opinion notes, takeover statutes were in effect in 37 States. See id. 631 n.6. Thus in that case as well the claims at issue directly affected the administration of state laws. New York, which stressed in its amicus brief its "significant interest in the issues presented by this appeal since the decision of this Court may affect the validity of" various New York laws, also noted that its statute was different in some crucial respects from Illinois', and on this basis was allowed to argument orally. And again, the Court also allowed time to the Solicitor General to argue orally against the state law. Thus, in that case, like City of Boerne v. Flores, the case at issue directly affected the laws of many states, and the amicus presented a different set of

arguments from the party.

Finally, in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1972), the Court considered whether Burbank's ordinance prohibiting overnight take off and landing at the city airport was preempted. Of course, perhaps the first thing to say about this case is that it was argued long enough ago that it reflects a markedly differently attitude by the Court toward divided argument than the Court now appears to hold. In fact, the Court allowed both the State of California and the Solicitor General time to argue in support of appellants. In any event, California was allowed argument time on the basis of an amicus brief that identified a state policy against noise pollution that was furthered by ordinances such as Burbank's, as well as a comprehensive state regulatory plan for noise pollution that "we would not like to see upset by a decision which on its face is directed at one municipal ordinance." Ohio and Chicago, of course, have no similar relationship, and the gang loitering ordinance does not directly further any interest or policy of Ohio.

4. Ohio does not appear to ask for a portion of argument time that would otherwise be allocated to Chicago, but only for 10 additional minutes in which to present argument. Any allocation to Ohio of a portion of our time should, in any event, not be allowed. Reducing the time available to us for argument would seriously prejudice the petitioner without advancing any interest of the Court's in a full presentation of the issues. We

say this for two reasons.

First, this case presents a multitude of complex constitutional issues. There are two sets of respondents, represented by separate counsel, who we are informed intend to file separate briefs on the merits. It will accordingly be difficult for petitioner to address all of the issues raised by this case if we are deprived of a substantial portion of its argument time. Counsel for Ohio cannot fill this gap because, as we explain above, he has little relevant experience in the enforcement of this or similar public order laws. In fact, in their brief, amici takes no position on a number of the grounds that respondents have advanced to attack the constitutionality of the ordinance at issue.

Second, as we note above, the state laws that amici appear in this Court to defend take a markedly different approach from our ordinance. The issues that bear directly on amici will therefore not likely be raised at argument. For that reason, neither the brief nor the motion gives any basis for thinking that an oral presentation by Ohio will assist the Court.

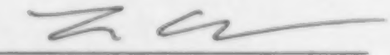
5. Counsel of record for the petitioner should be able to present the case to this Court without need of divided argument. Counsel is experienced in practice before this Court, having argued twice previously and having clerked for a Member of this Court. The motion, in fact does not identify any deficiency in counsel for petitioner or any reason why we would be unable to explain the impact of the litigation on the various state laws.

Given our abilities, on the one hand, and the limited familiarity of counsel for amici with enforcement of this type of law on the other, there is little reason to believe that divided argument would add a unique and valuable perspective that would not otherwise be available to the Court.

For all of these reasons, the petitioner respectfully requests that the motion of the amicus State of Ohio to participate in oral argument and for divided and expanded argument be denied.

Respectfully submitted,

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Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
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CERTIFICATE OF SERVICE

I certify that I served all parties required to be served with the Memorandum of the Petitioner in Opposition to Motion of Ohio for Divided Argument by placing a copy of the memorandum in envelopes addressed to each of the persons listed on the attached service list, affixing proper postage, and depositing those envelopes in the United States mail on July 8, 1998.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

No. 97-1121

City of Chicago,

Petitioner,

v.

Jesus Morales, *et al.*

Respondents.

On Writ of Certiorari to the
Supreme Court of Illinois

BRIEF OF RESPONDENTS

STATEMENT

The ordinance challenged in this case was adopted by the Chicago City Council in June 1992. Prior to adopting the ordinance, the City Council's Committee on Police and Fire conducted hearings about street gangs in City neighborhoods.

More than thirty citizens testified at the hearings. These citizens described gang members committing crimes such as drug-dealing, prostitution, and robbery. *E.g.*, Supp. R. II at 32.

Many witnesses described steps they had taken, individually and in groups, to effectively combat gang presence. A member of the Northwest Neighborhood Federation reported that the Federation had "evicted five gangs from five different [Chicago] communities." Supp. R. I at 50. Others testified that they reported crime by gang members, and testified against them in court. Supp. R. I at 71, 115; Supp. R. II at 23. One witness from a community group described how she had participated both in "positive loitering" to combat gang presence and also in neighborhood foot patrols, Supp. R. I at 113, 115; she also videotaped gang activities and showed the tapes to the police, Supp. R. I at 117. Various persons described confronting gang members directly and regularly. Supp. R. I at 75, 80. Finally, some persons identified gang members to police, *e.g.*, Supp. R. I at 126; and many routinely called police when gang members were present in their vicinity, Supp. R. I at 67, 70, 90, 94, 105, 108.

Witnesses and aldermen alike testified as to their frustration about the lack of police responsiveness to the incidence of serious and already illegal activities of the gang members. Oftentimes, the police are called but they take too long to respond. Supp. R. I at 61, 70, 80, 108. Some witnesses complained that the police simply did not show up at all when called. One witness, for example, described gang members congregating in a playlot late at night, blowing their whistles; the police told her that "until they break in and stab you, we aren't going to do anything." Supp. R. II at 36; *see also* Supp. R. I at 93-94.

There was related testimony that stepped-up and aggressive police presence in areas of serious gang activity could be very effective in reducing or eliminating gang activity. *E.g.*, Supp. R. I at 79. One witness strongly supported beefed up foot patrol presence in affected neighborhoods. Supp. R. I at 83-85.

Various reservations were expressed about the ordinance as an appropriate response to the problems posed by gang presence. For example, one witness expressed concern that the ordinance was "a little broad and a little vague." Supp. R. I at 78. A second witness emphasized "that people have to gather," and seemed to be worried that the ordinance might inappropriately be applied to "young people on our block . . . going to school." Supp. R. I at 97. And a third witness thought that the ordinance would be ineffective, and that a broader-based approach was necessary. Supp. R. I at 144-46.

One witness suggested that the ordinance was not necessary to combat the activities complained of at the hearings, because sufficient laws already existed on the books. Supp. R. I at 97, 101. At least three aldermen from high-crime wards on the south and west sides of Chicago vigorously echoed this theme. Alderman Steele, now a Circuit Court Judge, remarked that the City of Chicago already had a curfew law, a safe school law, and other laws on the books, and implied that they were being inadequately enforced. Supp. R. II at 43-44, 164. Alderman Shaw echoed this point, noting that there were already laws "dealing with drugs, recruitment [and] intimidation." Supp. R. II at 51. Alderman Jones remarked that the prospect of enforcement of the ordinance reminded him of the days of street sweeps in the early 1980s in Chicago. Supp. R. II at 70. And Alderman O'Connor chastised the State's Attorney of Cook County for encouraging the passage of a new anti-gang law when the county itself "ha[s] tools readily available to go after the recruitment of gang members as opposed to us sweeping the streets of known gang members." Supp. R. I at 10. He also noted more generally that "their [sic] are readily available tools, state and county level, which are not even being utilized." Supp. R. I at 11.

Finally, Chicago Police Deputy Superintendent Gerald Cooper testified. He was the only representative of the

Chicago Police Department, and the only person with an extensive professional policing background, who testified before the Committee. He began by acknowledging the serious problems posed by gang activities in neighborhoods. Supp. R. II at 173. He acknowledged that the ordinance could provide "another tool" for law enforcement, Supp. R. II at 178, but expressed concern that the police department had "been down this road before." Supp. R. II at 178. Cooper said that the ordinance would be "of some benefit," but only where officers had "advance prior knowledge of the background and the history of particular individuals." Supp. R. II at 179. He suggested that officers would not be able to approach a group and determine which persons were gang members and which were not, Supp. R. II at 179-80, and warned that "innocent or lawful people" would be arrested under the ordinance, Supp. R. II at 180. Cooper observed that, in about 90 percent of the examples of gang conduct given at the hearing, gang members would be subject to arrest under existing laws. Supp. R. II at 181-82. Finally, in answering whether the ordinance would eliminate youths loitering on street corners, Cooper responded: "I don't think it will." Supp. R. II at 184.

After these hearings, the Chicago City Council adopted the loitering ordinance. It is triggered when any person reasonably believed by a police officer to be a gang member is found loitering with any other person or persons in any public place. Pet. App. 61a. In such a circumstance, the ordinance requires the officer to order all the persons to "disperse and remove themselves from the area." *Id.* The officer is further required to arrest any person who does not "promptly" obey the order. General Order 92-4, sec. IV.C.2.a., Pet. App. 72a.[1]

[1] Citations to the appendix to the City's petition for certiorari appear as "Pet. App.," and citations to the City's brief in this Court appear herein as "Br." Citations to *amicus* briefs in support of the City appear as follows: to the Brief of

The ordinance was in effect for roughly three years. Over that time, the City reports that approximately 45,000 move on orders were issued and obeyed. Almost as many arrests were made. Br. 16.

In *City of Chicago v. Youkhana*, the Circuit Court of Cook County, in a written opinion, granted the motion to dismiss of fourteen defendants who had been arrested for violating the ordinance.[2] The court held that the ordinance was unconstitutional on three grounds. First, it held that the ordinance was void for vagueness, both because it failed to give notice of what conduct it prohibited, and because it vested too much discretion in police officers. Pet. App. 44a-53a. The court determined that the ordinance was not susceptible of a limiting construction. Pet. App. 52a. Second, the court determined that the ordinance unconstitutionally criminalized status by criminalizing the mere presence of gang members in public. Pet. App. 54a. Finally, the court held that the ordinance, in "reach[ing] all forms of protected conduct," was overbroad, in violation of both the First Amendment and Article 1, Section 5 of the Illinois Constitution. Pet. App. 56a-58a. The court observed that criminal laws already in existence provided police officers with sufficient authority to arrest persons who

the United States, "Br. U.S.," and to the Amicus Brief of the Chicago Neighborhood Organizations, "Br. CNO." Citations to the Brief of the Chicago Alliance for Neighborhood Safety as *Amicus* in support of Respondents appear as "Br. CANS." Finally, citations to the City's briefs in the state courts appears as follows: to the City's brief in the Illinois Supreme Court, "Pet. Br. Ill. S. Ct."; to the City's opening brief in the Illinois Appellate Court, "Pet. Br. Ill. App. Ct.," and to its reply, "Pet. Reply Br. Ill. App. Ct."; and to the City's trial court brief, "Pet. Br. Tr. Ct."

[2] In addition to this circuit court decision, twelve other circuit court judges decided cases involving the ordinance. Eight of these judges ruled the ordinance vague on its face; one ruled it vague as applied. The ordinance was upheld by two of these judges. Peter W. Poulos, *Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 Cal. L. Rev. 379, 384 n. 26 (1995).

actually commit crime and to protect the public from conduct that is truly illegal. R. 115.

The appellate court unanimously affirmed. First, it held that the ordinance was overbroad in that it infringed upon the rights of assembly, association, and expression as guaranteed under the First Amendment. Pet. App. 25a.[3] Second, the court held that the ordinance was void for vagueness. Pet. App. 31a-33a. Third, it agreed with the trial court that because the ordinance was "triggered when a gang member is loitering," it effectively criminalized status rather than conduct, in violation of the Eighth Amendment. Pet. App. 33a-34a. Finally, the court held that the ordinance was a "transparent attempt to avoid the probable cause requirement" and thus violated the Fourth Amendment. Pet. App. 35a.[4]

The City appealed to the Illinois Supreme Court, which, on October 17, 1997, unanimously affirmed the judgment of the appellate court. Like the courts below, the Illinois Supreme Court found that the ordinance provided the police no guidelines for determining when persons have apparent purposes, that it thus amounted to a grant of unfettered discretion to police officers, and that it was accordingly void for vagueness. Pet. App. 15a. In addition, the court specifically held that the ordinance failed to notify persons of ordinary intelligence what formerly innocent (or lawful) conduct it was criminalizing, Pet. App. 9a, and that it was

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[3] The appellate court also struck the ordinance down on an independent state ground, as violative of the state right to assemble in a peaceable manner. Pet. App. 27a.

[4] Upon affirming the circuit court decision, the appellate court consolidated the appeals taken by the City of cases in which a circuit court had ruled the ordinance unconstitutional, and affirmed on the basis of *Youkhana*. *City of Chicago v. Ramsey* (Pet. App. 39a-40a). These were cases involving sixty of sixty-six Respondents. In addition, the appellate court consolidated all appeals from judgments of conviction under the ordinance, and reversed those judgments, again on the basis of *Youkhana*. *City of Chicago v. Morales* (Pet. App. 37a-38a). These appeals involved the other six Respondents.

void for vagueness on this ground as well. Pet. App. 14a. Like the courts below, the Illinois Supreme Court held that the move-on order requirement did not cure the ordinance's vagueness defects, Pet. App. 13a, and that the ordinance did not admit a limiting construction, Pet. App. 16a. The court also held that the ordinance violated substantive due process in that it unreasonably and arbitrarily interfered with liberty interests protected by the Due Process Clause. Pet. App. 17a-18a. The court emphasized that "[t]he city is not helpless in its war against the criminal activity of gangs . . . [because] [m]any of the offensive activities the city claims the gang loitering ordinance will deter are already criminal acts." Pet. App. 19a. The court specifically identified relevant Illinois criminal statutes, including prohibitions on intimidation (720 ILCS 5/12-6); compelling organization membership (720 ILCS 5/12-6.1); aggravated intimidation (720 ILCS 5/12-6.2); and mob action (720 ILCS 5/25-1). The court did not reach Respondents' claims arising under the First, Fourth, and Eighth Amendments.

SUMMARY OF ARGUMENT

In 1992, just prior to the dramatic decline in crime nationally, the City of Chicago passed a vaguely worded loitering law that is sweeping in its scope. Its stated purpose is prophylactic – to prevent crime before it occurs by dispersing from public places on pain of arrest persons who an officer believes have "no apparent purpose." While supposedly directed at street gangs, the ordinance explicitly provides that anyone – including a parent, sibling, spouse or close friend – also is subject to the humiliation of banishment or arrest if they are "with" a suspected gang member in a public place.

The City's ordinance simply cannot be reconciled with our constitutional tradition, which protects the rights of people to freedom of movement and association. These guarantees always have included the right to freely use the

public ways, parks and other forums of our cities for the lawful purposes of engaging in family activities, and communicating with others about matters both personally important and of public concern. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

While rhetorically dressed in the garb of community-oriented policing, Chicago's loitering law in reality is nothing less than a return to the street sweeping laws of America's past. *Papachristou*, 405 U.S. at 171. And despite the City's claims of having created a novel ordinance, in vaguely prohibiting the act of simple loitering, the ordinance is no different in substance than its discredited ancestors. In fact, this law is even more threatening to individual liberty because it is not limited to the "criminal" that the City fears, but instead extends to anyone who is simply with a suspected gang member in public, no matter why.

For over 60 years, the decisions of this Court have condemned the inherent vagueness of loitering laws like Chicago's. *Thornhill v. Alabama*, 310 U.S. 88, 100 (1940); *Shuttlesworth*, 382 U.S. at 90-91; *Palmer v. City of Euclid*, 402 U.S. 544, 545 (1971); *Papachristou*, 405 U.S. at 162-71. The ordinance's vague prohibition on behavior without an apparent purpose fails to provide any standard by which people can measure their conduct. *Papachristou*, 405 U.S. at 165; *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). Similarly, the law provides no guidance to police officers. *Kolender v. Lawson*, 461 U.S. 352, 360 (1983).

The City claims that any vagueness in the term "loitering" is cured because the ordinance's move on order will inform people of what they need to do to avoid arrest – move on. However, because such an order does not inform a person of what they did to justify the order, or what to refrain from doing in the future, or whether to make an informed

choice to peaceably submit to arrest and challenge the charges in court, the ordinance still fails to provide fair notice. *United States v. Lanier*, 117 S. Ct. 1219 (1997). The ordinance is vague in all of its applications, and it is therefore unconstitutional on its face. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982).

This Court has recognized that loitering laws also implicate the fundamental right of free movement in public places and forums. *Kolender*, 461 U.S. at 358. That freedom, and its corollary right to remain innocently on the street, is of considerable vintage, and has been identified by this Court as an aspect of substantive due process in a line of cases beginning with *Williams v. Fears*, 179 U.S. 270, 274 (1900), running through *Kent v. Dulles*, 357 U.S. 116, 126 (1958), and *Aptheker v. Secretary of State*, 378 U.S. 500, 514 (1964), and culminating – for present purposes – with *Kolender*, 461 U.S. at 358. The City dismisses freedom of movement as being limited to the right "to travel abroad or from one state to another." However, our nation's history and tradition – as well as this Court's cases – make clear that the right to cross borders is an extension of the more basic right to move within them. Under the ordinance, this right of free movement is summarily suspended for substantial numbers of Chicago's citizenry, who are denied the simple freedom to stand with another in public if a police officer cannot discern their purpose and believes that at least one person is a gang member.

The City's justification for its prophylactic measure, that "standing around . . . under at least some circumstances" (Br. 17) may give rise to illegal behavior in the indefinite future, serves only to underscore the absence of narrow tailoring. Indeed, as the Supreme Court of Illinois found, the means and ends of the ordinance are so disconnected that it

cannot pass even the rational basis test required of all legislation under the Due Process Clause.

Loitering laws also abridge fundamental rights of speech and association. *Kolender*, 461 U.S. at 358; *Shuttlesworth*, 382 U.S. at 90-91. By interfering with the peaceful enjoyment of public streets, sidewalks, and parks, the ordinance substantially burdens both intimate and expressive association. *See Roberts*, 468 U.S. 618-19. The City dismisses the ordinance's burden on intimate association by unjustifiably defining the right as one that cannot be exercised out of doors; and the City trivializes the burden on expressive association by pretending that the exercise of such associational rights will always be apparent to police. But when one lays the ordinance over the array of intimate and associational conduct that human experience teaches us occurs in the traditional public fora of the streets, sidewalks, and parks, the ordinance's unacceptable burden on protected association is manifest. Because of its substantial overbreadth, the ordinance is unconstitutional on its face.

The Chicago ordinance violates the Eighth Amendment, as well, by criminalizing status in the absence of any *actus reus*. The law banishes from the public way suspected gang members, and any person who for any reason is with a suspected gang member, not because of what they have done, but instead because of who they are. The failure to exhibit an "apparent purpose" at every moment that one is in public cannot be the "act" needed to save the ordinance. This "act" includes such ubiquitous, reflexive, and virtually involuntary conduct as talking, strolling, eating, and just enjoying the fresh air. If the law were otherwise, the government might ban the status of narcotics addiction when combined with the "act" of getting out of bed or failing to leave the state; this, of course, would directly contravene *Robinson v. California*, 370 U.S. 660 (1962).

Finally, the Chicago ordinance violates the Fourth Amendment because it is, in the words of the Appellate Court of Illinois, "a transparent attempt to avoid the probable cause requirement." Pet. App. 35a. The law makes it a crime to look suspicious; that is, it authorizes arrest based upon the City's generic suspicion that someone might commit some unspecified crime sometime in the future if that person were allowed to continue to associate in public with a person who is suspected of belonging to a gang. Indeed, the City concedes that the ordinance is a "prophylactic" measure intended to "stop crime before it occurs." Br. 10, 14. This evasion of the probable cause requirement violates core Fourth Amendment principles. *E.g.*, *Wong Sun v. United States*, 371 U.S. 471, 479 (1963); *see also Terry v. Ohio*, 392 U.S. 1 (1968).

In sum, this Court should affirm the unanimous judgment below striking down the Chicago Ordinance, because it violates the First, Fourth, Fifth, Eighth, and Fourteenth Amendments.

ARGUMENT

I. THE CHICAGO ORDINANCE IS VOID FOR VAGUENESS.

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also Grayned v. City of Rockford*, 408 U.S. 104 (1972). These standards are not to be mechanically applied. Rather, "[t]he degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment." *Village of Hoffman*

Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982).

The factors that this Court has deemed relevant in making such determinations demand a high degree of specificity in the language of the City's ordinance. *See id.* at 455 U.S. at 498-99 (listing factors). The City's law focuses not on the narrow subject matter of economic regulation but rather on the broad range of all activity in which people engage while in public. It imposes criminal as opposed to civil penalties. And the ordinance contains no scienter or *mens rea* requirement that "may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Id.* at 499.

Most importantly, the demand for clarity of language is great because the law threatens to inhibit the exercise of other constitutionally protected rights. *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *Hoffman Estates*, 455 U.S. at 499. A loitering law of this type has "the potential for arbitrarily suppressing First Amendment liberties" and "implicates consideration of the constitutional right to freedom of movement." *Kolender*, 461 U.S. at 358.

In assessing the "nature of the enactment," this Court should consider the inherent operation of a loitering law. While some of these laws are more definite in their prohibition and more targeted to core criminal conduct,[5] Chicago's ordinance prohibits only the amorphous act of loitering. It is, therefore, a prohibition reminiscent of the most primitive and sweeping of the "street-cleaning" laws of

[5] For example, some laws contain requirements that the person engage in conduct evidencing an intent to commit a specific illegal act. *E.g.*, *City of Seattle v. Slack*, 784 P.2d 494 (Wash. 1989) (intent to solicit an act of prostitution); *People v. Smith*, 378 N.E.2d 1032 (N.Y. 1978) (purpose of soliciting an act of prostitution); *City of Tacoma v. Luvene*, 827 P.2d 1374 (Wash. 1992) (manifesting the purpose of engaging in drug-related activity); *People v. Superior Court (Caswell)*, 758 P.2d 1046, 1049 (Cal. 1988) (purpose of "engaging in or soliciting any lewd or lascivious or any unlawful act").

our nation's past. *See* John C. Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 216 (1985) (noting the potential of *Papachristou*-type laws to be used as street-sweeping devices and their susceptibility to vagueness challenges).[6]

A law prohibiting a person from remaining in one place "without an apparent purpose" is not a law to which people can conform their conduct. Virtually all the time, people have purposes for what they are doing. But often, involuntarily and unconsciously, they simply do not overtly display them. Despite this obvious fact about human conduct, Chicago's ordinance imposes the difficult, if not surreal, duty to ever be vigilant to advertise one's purposes. Further, this Court should be mindful that, in addition to possible arrest and prosecution, the law requires, in the first instance, the summary imposition of a sanction – dispersal from public by a police officer. Since most citizens will simply disperse, discriminatory and arbitrary enforcement may more easily occur because street level law enforcement decisions are completely shielded from prosecutorial and judicial review.

For over half a century, this Court has unequivocally disapproved, as unacceptably vague, statutory language like that in Chicago's ordinance because it effects broad and vague restrictions on persons "loitering" in public places.[7] In

[6] Chicago's ordinance itself was used as a street-sweeping device. In 1994, the Chicago Police Department announced Operation EDGE, as part of its efforts to "enforc[e] drug laws and the anti-gang loitering ordinance." *Cops Taking EDGE in Crime Battles*, Chi. Sun-Times (July 5, 1994) at 14. Operation EDGE involved flooding "hot spots" by as many as sixty uniformed officers, over a several-hour period, and the making of dozens of arrests. *Id.* In one such sweep, out of one hundred arrests made, sixty-nine were for gang loitering. *Sweep Nets 100 Arrests*, Chi. Sun-Times, Metro Briefings Section (Feb. 6, 1995).

[7] Indeed, even before this Court's decision in *Papachristou*, such vague and broad proscriptions gave lower federal and state courts no more pause than they have given this Court, and were regularly struck down on vagueness (often, among other) grounds. *E.g.*, *United States v. Kilgen*, 431 F.2d 627, 628 (5th Cir.

Thornhill v. Alabama, 310 U.S. 88 (1940) a state law prohibited, in part, "any person or persons . . . *without just cause or legal excuse* therefore, [from] . . . loiter[ing] about any place of lawful business . . . or picket[ing]" (emphasis

1970) (ordinance deeming a vagrant any person "wandering or strolling around from place to place without any lawful purpose or object" and any "habitual loafer"); *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968) (statute deeming a vagrant "any person who wanders about the streets at late or unusual hours of the night without any visible or lawful business and not giving a giving a good account of himself); *Territory of Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931) (statute making it a misdemeanor to "habitually loaf, loiter, and/or idle upon any public street or highway or in any public place"); *Kirkwood v. Loeb*, 323 F. Supp. 611, 611-13 (E.D. Tenn. 1971) (ordinance prohibiting, *inter alia*, loitering "without any legitimate business or purpose . . . on the sidewalks or public streets . . . after having been directed by an officer or member of the police force to move away therefrom"); *Gordon v. Schiro*, 310 F. Supp. 884, 887 (E.D. La. 1970) (deeming vagrants any persons who "loiter around any public place of assembly, without lawful business or reasons to be present"); *Landry v. Daley*, 280 F. Supp. 968, 969 (N.D. Ill. 1968) (prohibiting any persons from, *inter alia*, "wandering about the streets . . . without being able to give a satisfactory account of themselves"); *City of Columbus v. Thompson*, 266 N.W.2d 571, 572 (Ohio 1971) (prohibiting "any person who wanders about the streets . . . without any visible or lawful business and who does not give satisfactory account of himself"); *State of Maine v. Aucoin*, 278 A.2d 395 (Me. 1971) (prohibiting any person from "loiter[ing] in, on, or adjacent to any streets, ways, or public places, in the [City of Portland]"); *State of Wisconsin v. Starks*, 186 N.W.2d 245 (Wis. 1971) (prohibiting any person from "loitering near any structure, vehicle or private grounds . . . without the consent of the owner" unless able to account for his presence); *State of New Hampshire v. Hudson*, 274 A.2d 878 (N.H. 1971) (prohibiting any person, "after being warned by police officer, [from] loiter[ing] on sidewalks in the city in front of business establishments, public buildings or houses of worship"); *City of Portland v. James*, 444 P.2d 554 (Or. 1968) (prohibiting any person from "roam[ing] or be[ing] upon any street, alley or public place [between the hours of 1 and 5 o'clock A.M.]"); *City of Seattle v. Drew*, 423 P.2d 522, 523 (Wash. 1967) (prohibiting any person from "wandering or loitering abroad . . . from one-half hour after sunset to one-half hour before sunrise . . . [without giving] a satisfactory account of himself upon the demand of any police officer"); *People v. Diaz*, 151 N.E.2d 871 (N.Y. 1958) (prohibiting any person from "loung[ing] or loiter[ing] about any street or street corner in the City of Dunkirk"); *Commonwealth v. Carpenter*, 91 N.E.2d 666 (Mass. 1950) (prohibiting any person from "willfully and unreasonably saunter[ing] or loiter[ing] . . . for more than seven minutes after being directed by a police officer to move on"); *Territory of Hawaii v. Anduha*, 31 Haw. 459 (Haw. 1930) (same ordinance as in 48 F.2d 171).

added). In striking down the law on its face because of the breadth of its burden on speech and assembly, the Court concluded that the qualification "'without just cause or legal excuse' does not in any effective manner restrict the breadth of the regulation," precisely because "the words themselves *have no ascertainable meaning either inherent or historical*." (citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453-455.) *Id.* at 100 (emphasis added).[8]

Two decades later, in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), the Court was faced with an ordinance containing another vague and broad proscription on loitering in public. That ordinance forbade "any person to stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on." *Id.* at 90. The Court noted that the literal terms of the ordinance contained an unquestionable "constitutional vice," in that they did "not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat." *Id.* (quoting *Cox v. Louisiana*, 379 U.S. 536, 579 (1965) (separate opinion of Black, J.).[9]

In *Palmer v. City of Euclid*, 402 U.S. 544, 545 (1971), the Court was faced with a loitering ordinance penalizing "any person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business . . . ." This ordinance

[8] The Court's assessment of the ambiguity of the law's language was essential to the overbreadth analysis. *See Hoffman Estates*, 455 U.S. at 494 n.6 (in determining whether an enactment is overbroad, "a court should evaluate the ambiguous as well as the unambiguous scope of the enactment").

[9] The City implies that the vice of the *Shuttlesworth* ordinance, as written, was that it prohibited *standing* in public, in violation of the First Amendment. Br. 32. But the *Shuttlesworth* passage in question – that the prohibition on "stand[ing] or loiter[ing]" was not "clearly defined" – forces another conclusion. Since no one can seriously maintain that the term "stand" is vague, or not clearly defined, the Court's concern in this passage must have been with the vagueness of the term "loiter."

was deemed "vague and lacking ascertainable standards of guilt." *Id.* at 545. The Court reversed the conviction, holding that, as to the defendant in that case, the ordinance gave "insufficient notice" that it prohibited him from letting a friend out of his car and then remaining in the car talking on a car radio.[10]

Finally, the Court held the loitering law in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), unconstitutionally vague. That law prohibited, among other things, "wandering or strolling around from place to place without any lawful purpose or object." *Id.* at 156 n. 1. The Court struck the ordinance down as void for vagueness, both in that it "fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct was forbidden . . . and because it encourage[d] arbitrary and erratic arrests and convictions." *Id.* at 162 (citations omitted). The "restriction" that the wandering or strolling had to be "without any lawful purpose or object" did nothing to cure the ordinance's inherent vagueness; rather, it served simply to set "a trap for innocent acts." *Id.* at 164.

Thus, loitering ordinances that prohibit the simple act of "loitering," without further qualification or definition (*Shuttlesworth*), as well as those that criminalize loitering without lawful purpose (*Thornhill*, *Palmer*, and *Papachristou*) have consistently been considered impermissibly vague by this Court. Chicago's ordinance is likewise impermissibly vague. This Court, therefore, should declare the Chicago ordinance unconstitutional on its face,

[10] This "as applied" approach to correcting abuses of the law is the one recommended by the Solicitor General. Br. U.S. 10, 17 n. 13. But as *Palmer* illustrates, this Court has been down that road before. With inherently vague laws, unconstitutional in each and every application, the remedy is clear – facial invalidation.

because it "is impermissibly vague in all of its applications," *Hoffman Estates*, 455 U.S. at 494.[11]

A. The Ordinance Fails to Provide Adequate Notice.

This Court has repeatedly struck down vague statutes because they fail to provide persons with proper notice of prohibited conduct. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 & n. 3 (1972) ("Vague laws may trap the innocent by not providing fair warning.") (collecting cases); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (ordinance prohibiting "three or more persons to assemble . . . on any of the sidewalks, street corners . . . and there conduct themselves in a manner annoying to persons passing by" held unconstitutionally vague because "it subjects the exercise of the right to assembly to an unascertainable standard"); *Papachristou*, 405 U.S. at 162 (vagrancy ordinance held void for vagueness because "it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute'") (citation omitted). As shown below, Chicago's ordinance, because it does not provide any meaningful standard to which persons may conform their conduct, fails to provide fair warning.

The ordinance requires a police officer who observes a person he reasonably believes to be a gang member "loitering" in any public place with one or more persons to order all such persons to disperse and remove themselves from the area. The police officer is then expressly required to

[11] In fact, at least so far as fair notice goes, Chicago's ordinance is even more onerous than the ordinances in *Thornhill*, *Palmer*, and *Papachristou*. At least the latter ordinances premised criminal liability on the *actual* purpose of the suspected loiterer. Here, the requirement is having an "apparent" purpose. Thus, Chicago's ordinance, unlike the laws at issue in this Court's prior loitering cases, does not allow explaining one's real purpose. In the City's words "it is immaterial [to enforcement of the ordinance] whether an individual may be able to explain his presence in a public place to the satisfaction of a police officer." Pet. Br. Ill. S. Ct. 52. Coupled with the lack of *mens rea*, this policy makes falling into the law's "trap for the innocent" almost a certainty.

arrest anyone who does not promptly obey. General Order 92-4, sec. VI.C.3.a., Pet. App. 72a. The ordinance's trigger is "loitering," which is defined as "to remain in any one place with no apparent purpose." Pet. App. 61a.

A law that prohibits remaining in a place without an "apparent purpose" is so amorphous that it provides no standard at all. People of ordinary intelligence cannot understand how to comply with its requirement. They do not and cannot know what they must do to demonstrate to an observing police officer that they are being purposeful at all times while in public. The City's ordinance, therefore, is vague "in the sense that no standard of conduct is specified at all." *Coates*, 402 U.S. at 614.

Courts have well recognized that the language of "no apparent purpose" fails to provide a standard for conduct. For example, in *United States ex rel. Newsome v. Malcolm*, 492 F.2d 1166 (2d Cir. 1974), the Second Circuit struck down a New York criminal loitering statute, in part because the phrase "loiter[ing], remain[ing] or wander[ing] in or about a place *without apparent purpose*" was so vague as to make it impossible for a person to "conform his conduct" to it. *Id.* at 1172 (emphasis added). The Court observed that a person would be unable to discern whether he risked criminal responsibility by "taking a leisurely stroll, by sitting briefly on a park bench, or by seeking shelter from the elements in the doorway of a building." *Id.* at 1172-73. Similarly, the Ninth Circuit struck down as vague a prohibition on "loiter[ing] or wander[ing] upon the streets or from place to place *without apparent purpose*." *Powell v. Stone*, 507 F.2d 93, 95 (9th Cir. 1974) (emphasis added), *rev'd on other grounds*, 428 U.S. 465 (1976). And in *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968), the court condemned as unconstitutionally vague a prohibition on "wander[ing] about the streets at late or unusual hours . . . without any visible or lawful business," in part because this

language "failed to point up the prohibited act . . . and thus did not differentiate conduct calculated to harm and that which is essentially innocent." *Id.* at 1104 (internal citations omitted); *see also Kirkwood v. Loeb*, 323 F. Supp. 611 (W.D. Tenn. 1971) (striking down as vague a prohibition on loitering without legitimate business).

The City asserts that people "can judge . . . when one's purpose for staying put is not obvious to others who may come along." Br. 30.[12] But this assertion is an affront to common sense. People do not, and cannot reasonably be expected to go through their daily lives being conscious of whether they are at all times adequately manifesting to others their purpose for being present in public. They can have no confidence they will not be publicly embarrassed by a dispersal order or suffer the trauma of arrest while they are at shopping centers, plazas, or countless other places open to the public in their city, or even in their own neighborhood.

This difficulty is compounded by the limitless scope of human activity and inactivity covered by the law. It sweeps within its purview much of the everyday, innocent behavior in which people engage: from stopping on the sidewalk to speak with a friend or relative, to a family standing outside their own apartment on a hot evening to cool off; from a couple of guys resting after a basketball game, to couples

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[12] The City claims that the "better-reasoned decisions in the lower courts conclude that the term 'loitering' has a common sense meaning that reasonable persons can apprehend." Br. 30 n. 18. But the cases cited for that proposition do not remotely suggest that a prohibition on "loitering" alone would be adequate for due process notice. Each one of those cases qualified "loiter" in critical ways that, at a minimum, provided more specificity and hence more fair waning than the term "loiter" itself. *See People v. Superior Court*, 758 P.2d 1046, 1049 (Cal. 1988) (statute criminalizing loitering "in or about any toilet open to the public *for the purpose of* engaging in or soliciting any lewd or lascivious or any unlawful act") (emphasis added); *State v. Armstrong*, 162 N.W.2d 357, 358 (Minn. 1968) (prohibiting loitering "*with intent* to solicit for purposes of prostitution") (emphasis added); *Wiemerslage v. Maine Township High Sch. Dist. 207*, 29 F.3d 1149 (7th Cir. 1994) (non-penal school disciplinary rule prohibiting loitering in an area immediately adjacent to school property).

sitting on a park bench discussing their relationship. While all of these activities are purposeful, under this law they would not have an "apparent purpose," so persons engaging in them would be subject to dispersal and arrest. In each of these circumstances "ordinary people" would not think that they would run afoul of a law prohibiting "loitering."

The Illinois Supreme Court illustrated the reach of the ordinance to these kinds of activities:

> People with entirely legitimate and lawful purposes will not always be able to make their purposes apparent to an observing police officer. For example, a person waiting to hail a taxi, resting on a corner during a jog, or stepping into a doorway to evade a rain shower has a perfectly legitimate purpose in all these scenarios; however, that purpose will rarely be apparent to an observer.

Pet. App. 10a.[13] In view of the City Council's intent to create "an exceptionally broad ordinance" to be used "to sweep . . . gang members from the city streets," Pet. App. 16a, and the law's unqualified charge to disperse or arrest all persons without an apparent purpose, the Illinois Supreme Court properly interpreted the ordinance as applying to these situations.

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[13] The Illinois Supreme Court ruled the ordinance to be "not reasonably susceptible to a limiting construction." Pet. App. 16a. The court reasoned that the clear and unambiguous intent of the City Council was to write "an exceptionally broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets." Pet. App. 16a. The Illinois Supreme Court's refusal to provide a narrowing construction of the ordinance is binding on this Court. As this Court has explained, "[f]or the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation 'we must take the statute as thought it read precisely as the highest court of the State has interpreted it.'" *Wainwright v. Stone*, 414 U.S. 21, 22 (1973) (quoting *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 273 (1940)); *see also Johnson v. Fankell*, 117 S. Ct. 1800, 1804 (1997). Equally binding is the Illinois Supreme Court's interpretation of the City Council's legislative intent. *E.g., Acadia Ins. Co. v. McNeil*, 116 F.3d 599, 605 (1st Cir. 1997); *Holdren v. Legursky*, 16 F.3d 57, 62 (4th Cir. 1994); *see also* Br. CANS 12-18.

The City has confirmed the correctness of the State court's conclusion that purposeful activities are subject to the ordinance's strictures through a series of examples of its enforcement policies.[14] In fact, the City established that it not only intended to include purposeful conduct within the ordinance's reach, but that it would be selective about what purposeful conduct it would sanction. Thus, two people "debating the constitutionality of the ordinance" (Pet. Br. Ill. S. Ct. 43), "a minister arguing with gang members" (Pet. Reply Br. Ill. Ct. App. at 22), "a community outreach employee who actively seeks out gang members to assist them in breaking free of the gang" (Pet. App. 57a), and "a street corner seminar with gang members on the merits of President Clinton's economic program" are all prohibited (Pet. Br. Tr. Ct. 26-27). But a gang member speaking with another person to request a charitable contribution to the gang (Pet. Br. Ill. S. Ct. 46; *see also* Br. 27) or a person soliciting a gang member's vote in an upcoming election (Pet. Reply Br. Ill. Ct. App. 21) would not be subject to prosecution under the ordinance. The City also has advised that a family that includes a suspected gang member is subject to dispersal and arrest even when "they are outside their apartment building getting some fresh air." Supp. R. II at 231.

As the City's own enforcement practices demonstrate, no person could possibly seek to conform his conduct to a consistent standard. The City ultimately makes subjective and arbitrary choices between purposes it deems apparent and

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[14] In this Court, the City has introduced a new standard -- a purpose must be "immediately discernable" to a police officer. Br. 38. This standard suggests a quick and superficial evaluation of conduct. *See* Part I.B, *infra*, regarding arbitrary and discriminatory enforcement.

It is worth noting that, in a passage attempting to provide yet another standard for understanding "no apparent purpose," the Solicitor General believes that, *in smoking a cigarette outside a "no-smoking" building*, a person will have an apparent purpose. Br. U.S. 12.

those that are "not apparent." In short, there is "no standard . . . at all." *Coates*, 402 U.S. at 614.[15]

The Illinois Supreme Court also condemned Chicago's law because its vague language, coupled with the legislature's intent, prohibited innocent conduct that ordinary persons would never reasonably suspect to be criminal. Pet. App. 9a Thus, the court noted that the ordinance "makes criminal activities which by modern standards are normally innocent." Pet. App. 9a (quoting *Papachristou*, 405 U.S. at 163).[16]

Both the City (Br. 31) and its *amici* (*e.g.*, Br. U.S. 15) argue that the Illinois Supreme Court's analysis was

[15] The City has continually attempted to distinguish some prohibited communications it characterizes as mere "chit chat" from other, permissible communications like soliciting charitable contributions for the gang or soliciting the votes of gang members. The City believes only the latter to be independently protected under the First Amendment (*e.g.*, Br. 27). While Respondents take exception to the City's proffered distinction, *see* Part III, *infra*, it has no relevance to the adequacy of the law's notice. To ordinary people, talking is talking. In both sets of circumstances people are speaking with each other in a public place. Neither the content of the communication (*e.g.*, "debating the constitutionality of the ordinance" versus asking for money), nor the identity of the speakers alters the participants' reasonable expectation that their purpose – communicating with another person in an historically recognized public forum – is apparent. The lack of a standard is amply illustrated in the record. Defendant Jesus Morales was observed to be "[t]alking to citizens on the street," but neither the arresting officer nor the trial court deemed that purpose to be sufficiently apparent to escape an arrest and conviction for the offense of gang loitering. Morales, R. 6.

[16] The state court went on to note that "[a]lthough persons of ordinary intelligence may maintain a common and accepted meaning of the word 'loiter,' such term by itself is inadequate to inform a citizen of its criminal implications." Pet. App. 9a. This remark precisely explains why the City is wrong in asserting that "if the term 'loitering' were so vague that people ordinarily cannot tell when they are violating the law, all loitering laws would fall." Br. 30. The common sense meaning of "loiter" is simply too indefinite to mark a *common sense* distinction between criminal and non-criminal activity, and so prohibitions on "loitering" alone fail to provide fair warning. By contrast, a prohibition that contains the term "loiter," but that contains further detailed specification of the prohibited act – for example, by adding an element of intent to commit an additional illegal act, *e.g.*, *Luvene*, 827 P.2d 1374 – have at least the possibility of surviving vagueness scrutiny.

corrupted because, rather than determining vagueness, it actually was making a substantive decision about whether "innocent conduct" could be made criminal. They are wrong. The State court, like this Court in *Papachristou*, did no more than recognize that in such circumstances, where a law criminalizes previously innocent conduct, more definiteness in language is required.

This Court's "fair warning" jurisprudence, of which the notice requirement of the vagueness doctrine is a "related manifestation," *United States v. Lanier*, 117 S. Ct. 1219, 1225 (1997), long ago recognized this relationship between vague statutory language and the unreasonable risk it imposes on people engaging in conduct they reasonably believe to be innocent. "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid [citation omitted], may be as much of a trap for the innocent as the laws of Caligula." *United States v. Cardiff*, 344 U.S. 174, 176 (1952); *see also Cramp v. Board of Pub. Instruction*, 137 S.2d 828 (Fla. 1962).[17]

Nor was the Illinois Supreme Court in error when it considered in its evaluation of vagueness that the language of the City's loitering law did not distinguish between innocent acts and "conduct *calculated* to cause harm." Pet. App. 9a (emphasis added); *see also*. Br. 31; Br. U.S. 15. This Court has explicitly stated that in determining "[t]he degree of vagueness that the Constitution tolerates," a scienter requirement is relevant "especially with respect to the

[17] This Court's decision in *Hoffman Estates*, 445 U.S. at 497 n. 9, as cited by the Solicitor General (Br. U.S. 15), is not to the contrary. There, as the Solicitor General posits, the Court said simply that because the law in issue was not vague, the fact that innocent conduct was included within its scope was not a defect in clarity, but an issue of substantive due process. The Court never said that in evaluating the degree of definiteness required in a given penal statute it was improper to consider the normally innocent nature of the conduct sought to be criminalized.

adequacy of notice to the complainant that his conduct is proscribed." *Hoffman Estates*, 455 U.S. at 499; *see also Colautti v. Franklin*, 439 U.S. 379, 395 (1979).[18] Indeed, a proper objective of a scienter requirement is to insure that a law does not "criminalize a broad range of apparently innocent conduct." *Liparota v. United States*, 471 U.S. 419, 426 (1985).[19]

In addition to lacking a standard for determining which purposes are apparent and which are not, the ordinance does not put persons of ordinary intelligence on notice as to *where* in Chicago they can remain in public. It is City policy not to disclose what areas are in fact designated for enforcement of the ordinance.[20] Thus, while not every block or corner in Chicago, presumably, is designated, persons of ordinary intelligence do not and cannot know where they can go in the City to avoid the ordinance's strictures. Nor can they know

[18] Though a scienter provision is not constitutionally required in every criminal statute, *Liparota*, 471 U.S. 419, its absence is a factor to be considered in determining if the statute provides constitutionally adequate notice.

[19] While the City has no trouble making findings as to the purpose of gang members in loitering ("WHEREAS, One of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas," Pet. App. 60a), it refuses to refine its broad and vaguely worded loitering law to target that very conduct – conduct that the City says it seeks to curb. Thus, "this is not a case where further precision of the statutory language is either impossible or impractical." *Kolender*, 461 U.S. at 361; *see* Anthony G. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 Crim. L. Bull. No. 4 205, 219 (1967) ("it seems hardly disputable that some of these prohibitions are expressed with an imprecision that is *unnecessary* in furtherance of any legitimate regulatory objective").

[20] The City refused a request, pursuant to the Illinois Freedom of Information Act, to release information about the designated areas stating that "[d]issemination of [information regarding] the size of designated areas and their proximity to one another . . . would impair the Police Department's ability to fight crime . . . ." *American Civil Liberties Union v. City of Chicago*, No. 98 CH 10054 (Circuit Ct. Cook County), Memorandum in Support of Defendants' Motion for Summary Judgment and Request for Relief from the Index Requirement at 6.

what exactly to do in the event that they are ordered to move on. They cannot know where to move *to* because they cannot know what *other* areas are designated. Indeed, designations were changed "fairly often [because it was] . . . a fluid and changing kind of situation." Deposition of Thomas Needham at 11 ("Needham Dep.") (*American Civil Liberties Union v. City of Chicago*, *supra*, note 20). This only exacerbates the uncertainty. And the public cannot tell where they must move *from*, because there exists no guidance in the ordinance, in the General Order, or anywhere else indicating the geographical scope of the term "area."[21]

Finally, for all that appears, areas are designated with high frequency. The ordinance was enforced in 24 out of 25 Chicago police districts.[22] It was enforced on the streets, in parks, at schools, and in housing projects. Needham Dep. at 85. Moreover, the sixty-six defendants in this case were arrested in at least twenty-eight different locations. (Complaints of Respondents)[23] Based on this information, a person potentially affected by the ordinance could reasonably assume that that there are thousands of designated areas in the City of Chicago.

[21] In this respect, the ordinance is completely different from the *injunction* approved by the California Supreme Court in *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997). That injunction, based on very specific and detailed findings about the criminal activities of certain named defendants in a specifically delineated four square block area of San Jose, prohibited those very individuals from returning to that delineated area. *Id.* at 282-83. Unlike those potentially within the reach of Chicago's ordinance, those subject to the San Jose injunction knew exactly where they could and could not go.

[22] Officer Louis Gaal, *Chicago Police Department Gang Investigation Section, Report on Gang Loitering Ordinance*, at 2-3 (Jan. 5, 1996).

[23] Information about the *Youkhana* defendants was derived from the complaints in the common law record. Clerks in the Illinois appellate and circuit courts were unable to locate records for many of the defendants in *Ramsey* and *Morales*, and as a result a common law record does not exist for them. Information as to these defendants was developed from an examination of the complaints on file at the office of the Clerk of the Circuit Court of Cook County.

The City further argues that even if the written terms of the ordinance do not provide sufficient notice of prohibited conduct, the problem is solved by the move-on, or dispersal, requirement of the law. Br. 30. The first flaw in the City's argument is that it treats the officer's order of dispersal as an event without practical or legal consequence. But dispersal is only permitted because it is authorized under the ordinance. An officer has no right in its absence to make such an order, as a result of which persons suffer at least a restraint on their right of free movement as well as the public humiliation and stigma of being banished from public. Consequently, to argue that one has a right to notice only before arrest but not before being required to leave a public place runs afoul of the most basic notion of due process.

This Court recently wrote that fair warning should be given "in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *Lanier*, 117 S. Ct. at 1219, 1220 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). Here, the ordinance informs the person "of what the law intends to do" – order such person to disperse and remove himself from the area. What it fails to do is define with clarity what "certain line is passed." Thus, the failure to provide notice prior to requiring dispersal is, itself, a denial of fair warning.

A second flaw in the City's view about notice is that in reality it simply amounts to an end-run around this principle of fair warning. On the City's view, all a law would need to do to comport with due process is include a provision that a person will be told to disperse before being arrested and prosecuted for underlying conduct that itself is insufficiently defined by the law.

It is, of course, true, as the City points out, that persons will know what they need to do to avoid arrest under the ordinance – *i.e.*, obey the order. Br. 29. But given the

vagueness of the term "loiter," they will not know specifically what they did that triggered the order or what they need to do or refrain from doing in the future to avoid being dispersed from public places. Moreover, a person has a right to adequate notice so that he may determine whether the officer is misapplying a law and whether to refuse to disperse, submit peaceably to arrest, and defend the charges at trial. *Lambert v. California*, 355 U.S. 225, 228 (1957) ("Notice is sometimes essential so that the citizen has the chance to defend charges."). "[T]he touchstone [of fair warning] is whether the statute, either standing alone or as construed, made it reasonably clear *at the relevant time*, that the defendant's conduct was criminal," *Lanier*, 117 S. Ct. at 1219-20 (emphasis added), not that it displeased a police officer.

Because a move-on order, alone, can never inform individuals how to conform their behavior to the law in advance, such an order cannot, alone, cure a vague description of the underlying prohibited conduct. Consequently, the ordinance's dispersal feature does not serve this function.

Moreover, as the Illinois Supreme Court correctly observed, Pet. App. 13a, the City's position is directly inconsistent with this Court's teaching in *Shuttlesworth*. Under *Shuttlesworth*, a loitering law that only notifies a person that he acts illegally if he does not move on is unconstitutionally vague. *Shuttlesworth*, 382 U.S. at 90-91; *see also Wright v. Georgia*, 373 U.S. 284, 291-92 (1963) ("[O]ne cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution.").

The City argues that *Colten v. Kentucky*, 407 U.S. 104 (1972), is "dispositive" as to the constitutionality of loitering ordinances that require move-on orders. Br. 29. It is mistaken. In *Colten*, this Court was confronted with a

disorderly conduct statute that, in contrast to the ordinance here, clearly defined the conduct that it made subject to an order of dispersal. According to the City's selective quotation, *Colten* says that "anyone 'should understand that he could be convicted . . . if he fails to obey an order to move on.'" Br. 29 (quoting *Colten*, 407 U.S. at 110). But what the City leaves out of this quotation says much more than what it left in.

The *Colten* law subjected one to arrest if he refused an order to disperse when he was congregating with others in a public place with intent to cause public inconvenience, annoyance, or alarm. In fact, what the Court wrote was that "[a]ny person *who stands in a group of persons along a highway where the police are investigating a traffic violation and seeks to engage the attention of an officer issuing a summons* should understand that he could be convicted *under [this law]* . . . if he fails to obey an order to move on." *Colten*, 407 U.S. at 110 (emphases indicating passages omitted by City). The point of this passage is not that the move-on order cures any potential notice problem attending the definition of the underlying crime. Rather, the point is that the clarity of the underlying conduct legitimizes the move-on order.

Chicago's move-on order cannot save its ordinance precisely because the ordinance fails to define the underlying conduct purportedly prohibited. Nothing in *Colten* remotely suggests that this Court would approve Chicago's loitering law solely on the basis of its dispersal requirement.

Because Chicago's ordinance fails to describe the underlying conduct that it purports to prohibit in a manner that is understandable to a person of ordinary intelligence, it fails adequately to notify and is thus unconstitutionally vague.

B. The Ordinance Encourages Arbitrary And Discriminatory Enforcement.

"[T]he most important aspect of the vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358 (internal quotation and citation omitted). Where a criminal statute fails to provide such minimal guidelines, it "may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.* (internal quotation and citation omitted). It furnishes a convenient tool for "'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" *Papachristou*, 405 U.S. at 170 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940)). [24]

In *Coates*, an ordinance that subjected the right of assembly to the unascertainable standard of whether persons assembling on any sidewalk were "conduct[ing] themselves in a manner annoying to persons passing by" could not stand, in part because its violation could "entirely depend upon whether or not a policemen [was] annoyed." 402 U.S. at 614. Similarly, in *Kolender*, a criminal statute that required persons who loitered to provide "'credible and reliable' identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of *Terry v. Ohio*" was found to be vague. The statute, the Court held, "vest[ed] virtually complete discretion in the hands of the police to determine whether the suspect ha[d] satisfied the statute . . . ." 461 U.S. at 358. Like the ordinances in *Coates* and *Kolender*, Chicago's ordinance provides no standards by which a police

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[24] The City suggests that a serious commitment to community policing involves supporting "a greater leeway for state and local government to address signs of chronic disorder on the streets." Br. 15. While it is obscure what kind of "leeway" the City might have in mind, it is perfectly clear that the ordinance is, in fact, the antithesis of community policing and sound law enforcement practice. *See generally* Brief of Amici Curiae National Black Police Association, et al.

officer can determine what conduct it prohibits, thus inviting discriminatory enforcement. For this reason as well, it is unconstitutionally vague.

Despite the critical role that a police officer plays under the ordinance in determining when conduct lacks an apparent purpose, neither the ordinance nor the General Order provides any guidelines whatsoever for making that determination. Instead, the determination is left to the officer's subjective, wholly discretionary judgment. The City's "talking" examples dramatically illustrate that this is so. As noted, the City has indicated that some kinds of communications between persons appear on the individuals' sleeves, and others do not. Police officers are advised that persons conducting street corner seminars on economics or debating the constitutionality of this ordinance (or, presumably, the likely outcome of this case) have no "apparent purpose." Nor do ministers who are arguing with gang members. But police officers are also advised that gang members asking for donations and persons soliciting the votes of suspected gang members and others in their vicinity do have an "apparent purpose" and are to be left alone. The proposed distinction, which police officers are to make, is that some talk is "chit-chat" and other talk is not. Br. 21, 38. But how, conceivably, can police officers be expected to act on such a distinction? They can't *ask* what people are talking about. Even if they could command answers (which they cannot, *Kolender*, 461 U.S. at 360 n. 9), any answer would divulge what the individuals' *actual* purposes were. But the ordinance instructs police officers to determine only whether there is an *apparent* purpose; any *actual* purpose, the City has instructed, is "immaterial." Pet. Br. Ill. S. Ct. 52.

Police officers will not be able to distinguish ministers and political candidates from other people. They will not readily be able to determine the content of street corner conversations. Moreover, under the intermediate scrutiny

test advanced by the City, Br. 24-25, neither the content of the speech nor the identity of the speaker may be considered in making the chit-chat assessment. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). See *infra* Section III.C.

In sum, police officers are left completely to their own devices, without standards, in determining when to enforce and when not to enforce the ordinance. Because the ordinance thus vests police officers with unlimited enforcement discretion, it is like the ordinances in *Coates* and *Kolender*, and is void for vagueness.

The City argues that the discretion of police officers is limited because the ordinance requires that the "officer 'reasonably believes' that the group contains a member of a criminal street gang." Br. 34. While "reasonable belief" is not, *in itself*, vague, whether a reasonable belief requirement, in a particular context, serves to sufficiently limit police discretion depends on what the reasonable belief must be *of*. As the Illinois Supreme Court correctly noted, even if the ordinance's reasonable belief provision objectively limited the discretion of police officers *with respect to who is a gang member*, it "does absolutely nothing to cure the imprecisions of the definition of the "loitering" element of the crime," Pet. App. 16a. That requirement, therefore, does nothing to save the ordinance.

Thus, the City's citations to *Terry* and *Boos*, Br. 35-36, are unavailing. In both of those cases, while "reasonable belief" was the level of certainty of criminal conduct required before an officer could act, the criminal conduct itself was sufficiently well defined. In fact, in *Boos*, it was the definiteness of the law's language that legitimized the move-on order – not the other way around. *Boos v. Barry*, 485 U.S. 312, 332 (1988).[25]

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[25] Finally, the inherent risk of arbitrary and discriminatory enforcement of the ordinance is vividly illustrated by the record of Jesus Morales, one of the defendants convicted of gang loitering. The arresting officer, Officer Frannie,

Because Chicago's ordinance, even in combination with the General Order, sets no standard with its prohibition on being in public with "no apparent purpose," it fails to provide guidance to police officers as to how to enforce it. Moreover, the enforcement policies of the City only highlight the arbitrariness of the law. No amount of tinkering with, or interpreting, *other* parts of the ordinance – either its putative restrictions on whom to arrest and where, or its requirement of a move-on order – will cure this underlying and fatal grant of unfettered discretion to police officers and thus, no amount of tinkering can save the ordinance from unconstitutionality.

admitted at trial that he originally approached Morales, who was standing with a group of Hispanic teenagers talking to citizens on the corner in a Caucasian neighborhood "because we wanted to know if they lived in the neighborhood or from the neighborhood." Morales, R. 6-7, 12-14. He did not recognize Morales or any of the others. *Id.* at 6. He did not ask any of them if they were gang members. *Id.* at 8, 10. While he said that he knew that they were gang members "from pass [sic] experience," *id.* at 8, he admitted that he made this judgment specifically as to Morales and at least one of the other teenagers solely on the basis that they were wearing blue and black clothing. *Id.* at 8, 10. A fair reading of Frannie's testimony – especially in light of his admission that he didn't recognize any of the teenagers – was that the "past experience" was simply his experience that the colors worn by these individuals were allegedly gang colors. (Instructively, the City asserts that some of the teenagers were self-admitted gang members, Br. 34 n. 21, but *it cites only to the arrest report*. That report – which was not offered in evidence – was fairly contradicted by Frannie's own testimony at trial that "there were no statements made [as to possible gang membership of any of the persons involved.]" *Id.* at 10.)

This example highlights the fact that the vague terms of this ordinance clear the way for a police officer or trier of fact to make decisions about whom to arrest and convict based on whim, personal animus or outright racial discrimination.

II. THE ORDINANCE UNCONSTITUTIONALLY ABRIDGES THE RIGHT OF FREE MOVEMENT IN PUBLIC PLACES AND FORUMS.

A. The Ordinance Burdens Respondents' Fundamental Right Of Free Movement In Public Places And Forums.

Chicago's ordinance abridges Respondents' fundamental right of free movement in public places and forums.[26] The Illinois Supreme Court correctly recognized that the ordinance burdens Respondents' freedom of movement, and held that the ordinance fails even the tolerant rational basis test applicable to all legislation. Pet. App. 18a-19a; *e.g.*, *Washington v. Glucksberg*, 117 S. Ct. 2258, 2271 (1997). As explained below, the right of free movement is embodied in various Anglo-American charters of government and has been identified by, among others, Blackstone, Kent, and members of this Court dating back to Justice Washington and Chief Justice Taney. This history at once clarifies the fundamental nature of the right and refutes the City's claim that free movement under the Constitution is limited to "travel abroad or from one state to another." Br. 39. In fact, that history, along with this Court's free movement and right-to-travel case law, reveals that the right to move between

[26] Respondents challenge the ordinance insofar as it unconstitutionally affects the conduct both of suspected gang members and of persons not suspected to be gang members. Thirty-four Respondents were charged with "loitering" with "one or more" or "two or more" persons who were alleged to be members of a (sometimes named) criminal street gang. "The charges [in these cases] were framed in the words of the [ordinance] and so must be given a like construction." *Thornhill v. State of Alabama*, 310 U.S. 88, 96 (1940).

jurisdictions is an extension of the even more fundamental, if often implicit, right to move within them.[27]

The right of free movement is firmly grounded in our nation's history and tradition. The City's strawman rhetoric notwithstanding, this fundamental guarantee in no sense amounts to a "fundamental right to loiter." *E.g.*, Br. 39, 40-41. Rather, carefully described, it is the basic right of the individual to free movement in public places and forums, and the corollary right of the individual not to be banished from public places and forums if he chooses to remain there, so long as he is not threatening or engaging in otherwise unlawful conduct. This is the timeworn right identified by Blackstone: "[P]ersonal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct . . . ." 1 William Blackstone, *Commentaries* *134. The right includes going to, remaining in, and leaving, at one's own pleasure, such public places and forums as parks, plazas, streets, sidewalks, and the myriad other public spaces in and around

[27] Respondents' assertion of their fundamental right of free movement is fully consistent with *Graham v. Connor*, 490 U.S. 386 (1989), and cases following *Graham*. Although substantive due process cannot safeguard a liberty interest that already enjoys "an explicit source of constitutional protection," *County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1714 (1998) (quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion)), the analysis in a particular case cannot always be pigeonholed under the Bill of Rights, on one side, or the Fourteenth Amendment, on the other: "Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Soldal v. Cook County*, 506 U.S. 56, 70 (1992); *see also United States v. James Daniel Good Real Property*, 510 U.S. 43, 49-50 (1993). In such cases, the Court "examine[s] each constitutional provision in turn," *Soldal*, 506 U.S. at 70, and "[t]he proper question is not which Amendment controls but whether [any] Amendment is violated." *James Daniel Good Real Property*, 510 U.S. at 50. Because Respondents' right of free movement is separate and independent of the speech and associational rights protected by the First Amendment, of the right not to be arrested except upon probable cause protected by the Fourth Amendment, and of the right not to be punished solely on the basis of status protected by the Eighth Amendment, it is properly analyzed as a substantive component of the Fourteenth Amendment.

one's neighborhood. Indeed, the free use of such places is, for many, an integral and indispensable part of daily urban life.[28]

Freedom of movement found perhaps its earliest expression in the Anglo-American legal tradition in the Magna Carta, which guaranteed free passage into and out of England. Magna Carta, ch. 42 (1215). On this side of the Atlantic, the Articles of Confederation provided that "the people of each State shall have free ingress and egress to and from any other State . . . ." Articles of Confederation, Art. IV. The Rhode Island Charter explicitly granted that colony's citizens the right "to passe and repasse with freedome, *into and through* the rest of the English Collonies . . . ." Z. Chafee, *Three Human Rights in the Constitution of 1787* 177 (1956) (emphasis added). And Kent wrote that "[e]very nation is bound, in time of peace, to grant a passage for lawful purpose over their lands, rivers, and seas to the people of other states . . . ." 1 James Kent, *Commentaries on American Law* *34. In *United States v. Wheeler*, 254 U.S. 281, 293 (1920), the Court summarized the early American tradition as follows: "In all the states, from the beginning down to the adoption of the Articles of Confederation, the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, *to move at will from place to place therein*, and to have free ingress thereto and egress therefrom . . . ." (emphasis added).

[28] The City's suggestion that "loitering is the antithesis of travel," Br. 40, is shallow. An ordinance that prohibits otherwise law-abiding persons from pausing, resting, or standing still in public places manifestly affects one's freedom of movement. Just as a meaningful right of free speech must include a right not to speak (*e.g.*, *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1942)), and a meaningful right of association must embrace a right not to associate (*e.g.*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977)), so a meaningful right of free movement must encompass a right to remain in one place.

Early formulations of the right of free movement made clear that free movement *within* frontiers was the foundation on which the right to travel *across* them was built. In *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230), Justice Washington recognized the right of all citizens to "pass through, or to reside" in any state of the Union. Chief Justice Taney's dissenting opinion in *The Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849), later embraced by a majority of the Court in *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 48-49 (1868), is even more to the point: "We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, *as freely as in our own States*." (Emphasis added.)[29]

In the nomenclature of substantive due process, the individual's ability to move freely "throughout the United States," *United States v. Guest*, 383 U.S. 745, 758 (1966), has been treated by this Court as an aspect of personal liberty "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989).[30] In fact, the Court's treatment of free

[29] Rather than acknowledge the historical roots of the right of free movement, the City observes that loitering laws have a "considerable pedigree" tracing back to enactments in early England designed "to help feudal lords control their serfs . . . ." Br. 41. This Court recognized long ago, though, that "the theory of the Elizabethan poor laws no longer fits the facts." *Edwards v. California*, 314 U.S. 160, 174 (1941). Indeed, most of the feudal laws from which modern loitering laws descend are anathema today; the Statute of Laborers, for instance, was "designed to stabilize the labor force by prohibiting increases in wages and prohibiting the movement of workers from their home areas in search of improved conditions." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 161 (1972); *see generally* Caleb Foote, *Vagrancy-Type Law and its Administration*, 104 U. Pa. L. Rev. 603 (1956).

[30] Although freedom of movement "has long been recognized as a basic right under the Constitution," *Guest*, 383 U.S. at 758, the Court has not always been clear as to the textual source of that right. *E.g.*, *Williams v. Fears*, 179 U.S. 270, 274 (1900) (due process clause of Fourteenth Amendment); *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (due process clause of Fifth Amendment); *Edwards v. California*, 314 U.S. at 173-74 (commerce clause); *Twining v. New Jersey*, 211

movement as a facet of substantive due process dates back at least to *Williams v. Fears*, 179 U.S. 270, 274 (1900) where it explained:

> Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.

The Ninth Circuit struck a similar chord some thirty years later, when, in invalidating a state law that like Chicago's ordinance prohibited loitering in public places, it held:

> Personal liberty, which is guarantied to every citizen under our constitution and laws, consists of the right of locomotion – to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens.

Territory of Hawaii v. Anduha, 48 F.2d 171, 172 (9th Cir. 1931) (citation and quotations omitted); *see also Hague v. CIO*, 101 F.2d 774, 780 (3d Cir.) (affirming decree prohibiting city officials from banishing undesirable individuals from public places, and holding that "[i]ndividuals coming into or going about a city upon their lawful concerns must be allowed free locomotion upon the streets and public places"), *modified and aff'd on other grounds*, 307 U.S. 496 (1939).

U.S. 78, 97 (1908) (privileges or immunities clause of Fourteenth Amendment); *Paul v. Virginia*, 75 U.S. 168, 180 (1868) (privileges and immunities clause of Article IV); *Crandall v. Nevada*, 73 U.S. at 43-44 (general principles of federalism). The Court's modern travel cases rest principally on the due process and equal protection components of the Fifth and Fourteenth Amendments. *E.g.*, *Aptheker v. Secretary of State*, 378 U.S. 500, 505-06 (1964) (due process); *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) (equal protection); *see also* John Paul Stevens, *The Third Branch of Liberty*, 41 U. Miami L. Rev. 277, 287-88 (1986).

Williams, *Anduha*, and *Hague* all followed logically from the expressed understanding of at least one framer of the Fourteenth Amendment, Representative Wilson, who quoted Blackstone in explaining that the "liberty" to be protected by the Due Process Clause "consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct . . . ." Cong. Globe, 39th Cong., 1st Sess. 1119 (Mar. 1, 1866) (quoting 1 William Blackstone, *Commentaries* *134). Also apt was a question asked and answered by Senator Cowan during the Reconstruction debates: "What is that right of personal liberty? . . . [It is the] right to go where one pleases without restraint or hindrance on the part of any person." Cong. Globe, 39th Cong., 1st Sess. 1784 (Apr. 5, 1866).

This Court reaffirmed its grounding of free movement in substantive due process in *Kent v. Dulles*, 357 U.S. 116 (1958), and *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), both of which involved individuals denied passports on the basis of their affiliations with the Communist Party.[31] In *Kent* 357 U.S. at 117-19, 130, the Court held that the Secretary of State did not have the statutory authority to deny passports on that basis. In so doing, it explained:

> The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law .... Freedom of movement across frontiers in either direction, *and inside frontiers as well*, was a part of our heritage. . . . *Freedom of movement is basic in our scheme of values.*

Id. at 126 (emphasis added). In *Aptheker*, 378 U.S. at 514, the Court struck down the statute that authorized the denials squarely on the basis of the Due Process Clause, quoting *Kent*, and holding that because the prohibition at issue was "supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe[,]" the statute "swe[pt] too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment."

The relevance of *Kent* and *Aptheker* to laws like Chicago's that restrict localized movement is demonstrated by *Kolender v. Lawson*, 461 U.S. 352 (1983). In *Kolender*, the Court struck down as impermissibly vague a state statute that required persons who loiter or wander on the streets to provide "credible and reliable" identification at the reques. of a police officer who has reasonable suspicion of criminal activity. *Id.* at 353-54. The Court relied explicitly on both *Kent* and *Aptheker* in concluding that the statute "implicate[d] consideration of the constitutional right to freedom of movement." *Id.* at 358.[32]

Chicago's ordinance imposes an even greater burden on freedom of movement than did the statute in *Kolender*. A police officer needs no suspicion whatsoever of criminal activity to take action under Chicago's ordinance. Indeed, if the officer reasonably believes that a group of individuals includes a gang member, he *must* order the group to disperse even if he *knows* that nothing untoward is afoot. An

[31] Relying on *Zemel v. Rusk*, 381 U.S. 1 (1965), the Court in *Regan v. Wald*, 468 U.S. 222, 241-42 (1984), suggested that the right-to-travel aspects of *Kent* and *Aptheker* were "controlled" by First Amendment concerns. The *Zemel* Court, however, addressed *separately* the First Amendment and due process issues that had been raised in that case. 381 U.S. at 13-16 (due process); *id.* at 16-17 (First Amendment). In any event, to the extent *Kent* and *Aptheker* were driven, in part, by the selective, association-based nature of the regulations at issue, those regulations closely parallel Chicago's ordinance, which restricts only the movement of certain individuals on the basis of a disfavored association. *See* Part III, *infra*.

[32] The conclusion that the loitering regulation threatened the right of free movement was essential to the Court's holding in *Kolender* because the degree to which a challenged law "threatens to inhibit the exercise of constitutionally protected rights" is a crucial aspect of any vagueness determination, bearing directly on "the clarity that the Constitution demands of a law." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

individual challenged under the ordinance in *Kolender* could simply identify himself and avoid arrest; Chicago's ordinance, by contrast, provides no opportunity for its targets to explain their purposes, so they must in every case move on or face arrest.

In sum, freedom of movement encompasses more than the mere right, in the City's words, "to travel abroad or from one state to another." Br. 39. Although many of the Court's cases have involved burdens on travel between jurisdictions, *e.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Court has been clear that those cases treat the right to travel "in only a limited sense" and do not define the "ultimate scope" of the right. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 255 (1974). Our nation's history and tradition, particularly as they have been applied by this Court in the context of substantive due process, demonstrate that the right to travel across borders is but an outgrowth of the much more basic right to travel within them. This was the conclusion of the Third Circuit in *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990). There, the court reviewed at length this Court's right-to-travel and substantive due process jurisprudence and concluded that "the right to move freely about one's neighborhood or town . . . is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history[,]'" and is therefore a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.[33] Other lower courts agree with *Lutz*,[34] and to

[33] The *Lutz* court upheld the vehicular cruising ordinance before it by applying an intermediate standard of review that it analogized to First Amendment review of content-neutral time, place, and manner restrictions. *Lutz*, 899 F.2d at 269-70 & n. 40. The *Lutz* court's application of intermediate scrutiny is at loggerheads with this Court's approach to substantive due process, where infringements of fundamental rights necessarily fail constitutional scrutiny unless they are "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). In any event, intermediate scrutiny would be inappropriate in this case. The burden imposed by Chicago's ordinance – a blanket prohibition of certain persons appearing idle in public – dwarfs the

the extent this Court perceives any constitutional distinction between interstate and localized movement,[35] it has explicitly declined to draw it. *Memorial Hospital*, 415 U.S. at 255.[36]

Finally, the City contends that this Court's decisions in *Colten v. Kentucky*, 407 U.S. 104 (1972), and *City of Dallas v. Stanglin*, 490 U.S. 19 (1989), "refuse to recognize a right to go – or remain – wherever one wants." Br. 40. Again, the City mischaracterizes the interest at stake. Clearly, the right of free movement in public places and forums does not afford to anyone an unqualified license to roam the public streets and parks completely free of any and all restrictions. As the *Lutz* court recognized, the right is implicated, and heightened scrutiny is warranted, only where a restriction imposes some nontrivial burden on movement. *Lutz*, 899 F.2d at 270 n. 41 ("Nothing we say today suggests that more conventional traffic regulations such as speed limits, stop signs, and the like need now be subjected to heightened judicial scrutiny."). Wherever lies the line between trivial and nontrivial burdens, requiring someone crossing the street at a busy intersection to

restriction of repetitive driving that was at issue in *Lutz*. Moreover, the Third Circuit itself recognized that where restrictions on movement distinguish among classes of travelers, as Chicago's does, the better analogy is to content-specific restrictions of speech, which command a more exacting standard of review. *Lutz*, 899 F.2d at 270 n. 40.

[34] *E.g.*, *Hutchins v. District of Columbia*, 144 F.3d 798, 806 (D.C. Cir. 1998) (petition for reh'g pending) (invalidating juvenile curfew ordinance), *aff'g*, 942 F. Supp. 665 (D.D.C. 1996); *id.* at 825 (Tatel, J., concurring in judgment); *Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997) (invalidating juvenile curfew ordinance); *Waters v. Barry*, 711 F. Supp. 1125, 1134 (D.D.C. 1989) (same).

[35] Several lower courts have found the distinction insupportable. *E.g.*, *Lutz*, 899 F.2d at 268; *King v. New Rochelle Municipal Housing Authority*, 442 F.2d 646, 648 (2d Cir. 1971); *cf. Cole v. Housing Authority of Newport*, 435 F.2d 807 (1st Cir. 1970) (invalidating municipal durational residency requirement for access to public housing as applied to applicant who moved from within state).

[36] Dicta in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 277 (1993), indicate only that barriers erected by protesters in the vicinity of abortion clinics do not burden the right to *interstate* travel. The Court in *Bray* did not address the right of localized movement involved here.

wait for a "walk" signal lies clearly to one side, and forcing an otherwise law-abiding individual to remove himself from a public place, on pain of arrest, lies as clearly to the other.[37]

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The right of free movement in public places and forums, with its corollary right to remain in one place while there, is a prerogative of every individual that is both "deeply rooted in this Nation's history and tradition," *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977), and "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). That the City's ordinance severely burdens that right is beyond question. The ordinance subjects to dispersal or arrest every person who appears idle in public with another – wholly without regard to his actual purpose for being there, wholly without regard to whether he himself is a gang member, and wholly without regard to whether he has any reason to know or suspect that he is with a gang member – anytime a police officer suspects that he or his companion is a gang member. The areas the City has designated for enforcement of the ordinance are constantly subject to change, appear to be substantial, and in any event are closely kept secrets, *see* Part I.A, *supra*, so the citizenry cannot avail itself of even a single safe public haven within the city limits. Thus, the City's ordinance effectively

[37] As for *Colten* and *Stanglin*, neither of those cases considered the right of free movement that is implicated by Chicago's ordinance. *Stanglin* addressed only the First Amendment status of "chance encounters in dance halls," involving "hundreds of teenagers . . . ." 490 U.S. at 24-25. *Colten*, too, was primarily a First Amendment case. There, the Court sustained a conviction under a disorderly conduct statute that made unlawful the failure to obey a police order to disperse where such refusal was accompanied by a specific intent to "cause public inconvenience, annoyance or alarm." 407 U.S. at 108. Unlike Chicago's ordinance, the statute at issue in *Colten* required an individualized determination by police that a particular person harbored a specific intent to cause a public harm. Moreover, the defendant in *Colten* was free to move or cease moving anywhere he pleased other than the crowded roadside scene of the traffic accident from which he was ordered (five times over) to disperse; Chicago's ordinance, on the other hand, prospectively restricts movement throughout the city.

banishes from the public way a sizable portion of the population, and in so doing substantially abridges the fundamental right of free movement.

B. The Ordinance Fails Constitutional Scrutiny Under Any Recognized Standard.

Because the City's ordinance burdens fundamental rights, it is subject to strict scrutiny. "In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available." *Bernal v. Fainter*, 467 U.S. 216, 219 (1984); *see also Miller v. Johnson*, 515 U.S. 900, 920 (1995). Thus, the ordinance must "substantially address, if not achieve, the avowed purpose." *Shaw v. Hunt*, 116 S. Ct. 1894, 1905 (1996); *see also Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("*Turner I*") (the government must prove that its law "will in fact alleviate [the targeted] harms in a direct and material way").

Ameliorating the violence, drug-trafficking, and vandalism attributed to street gangs, *see* Br. 41-42, Pet. App. 60a, 65a, is a state interest of considerable moment. *E.g.*, *United States v. Salerno*, 481 U.S. 739, 748-49 (1987). Likewise, the interest in preserving the stability of neighborhoods, Br. 42, is worthy of "high respect." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion). But the existence of even a serious problem does not justify any and all means that the City might devise to address it. Here, the City has utterly failed to establish that the ordinance satisfies any of the other requirements of strict scrutiny.

Indeed, because the City erroneously insists that its sweeping prohibition implicates no fundamental right, it advances no argument whatsoever that the ordinance could survive strict scrutiny. The City does, however, make much of the City Council's findings and of crime statistics regarding gang violence. And if required to defend its ordinance under strict scrutiny, the City no doubt would point

to the legislative findings and the crime statistics as proof. The City, however, overstates the significance of the findings and misstates the significance of the crime statistics.

As to the City Council's findings, it is well-established that legislative findings cannot, as a general proposition, sustain a law that is unconstitutional. *E.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 394-96 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1010, 1021, 1040 (1992); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773-74 (1973). The fact that the City Council concluded that a sufficient nexus existed between the ordinance and the evils of gang crime does not relieve this Court of its independent duty to determine whether the ordinance satisfies constitutional requirements. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495-96 (1986); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978); *Keyishian v. Board of Regents*, 385 U.S. 589, 608-10 (1967); *see also Turner Broadcasting System, Inc. v. FCC*, 117 S. Ct. 1174, 1205 (1997) ("*Turner II*") (O'Connor, J., dissenting). As part of this duty, the Court should consider whether the Council's factual justifications for the law are based on substantial evidence and constitute reasonable inferences from such evidence. *Turner I*, 512 U.S. at 666; *Edenfield v. Fane*, 507 U.S. 761, 770-73 (1993).

It is perfectly clear from even a cursory review that the legislative findings are little more than a self-justifying preface to an ordinance driven more by political needs than law enforcement needs. For example, the City Council purports to find as a legislative "fact" that the City "has an interest in discouraging *all persons* from loitering in public places with criminal gang members." Pet. App. 61a (emphasis added). The hearing record is devoid of information that non–gang members who merely associate

with gang members, and are not themselves involved in any criminal activities, in any way further criminal activities or otherwise pose any threat to law-abiding citizens. In fact, the Council had ample evidence to develop findings that were quite the opposite of those it did develop regarding the potential effectiveness of the ordinance. *See* Statement, *supra*. The Council is certainly entitled to speculate, but its unsupported conjecture is not entitled to much weight when fundamental constitutional rights are at stake.

Nor do the crime statistics proffered by the City prove the ordinance's effectiveness. *E.g.*, Br. 16. To begin with, such statistics – and their potential for manipulation – must be approached with significant analytical caution. In recent years, Chicago, like most other cities, has realized a substantial downward trend in the commission of serious crimes. *See* Chicago Police Dep't, *Annual Report 1997*, at 14. The potential causes for this phenomenon are varied and their interrelationship hopelessly complex. Experts have identified factors such as Chicago's new system of community policing, the improved economy, high incarceration rates, demographic and population changes, gun seizures, stabilization of drug markets, nuisance and violence abatement programs, greater social stability, and decreases in drug and alcohol use.[38]

In addition to the practical difficulty – if not impossibility – of drawing any reliable conclusions in this area, the City's own data, when examined as a whole, supports the notion that the ordinance had no effect on gang-related homicides as

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[38] *E.g.*, Chicago Community Policing Evaluation Consortium, *Community Policing in Chicago, Year Four: An Interim Report*, at 9 (Nov. 1997); National Institute of Justice, *Homicide in Eight U.S. Cities: Trends, Context, and Policy Implications*, at 3 (Dec. 1997); Fox Butterfield, *Reason for Dramatic Drop in Crime Puzzles the Experts*, N.Y. Times, Mar. 29, 1998.

much as it supports the City's proffered thesis.[39] *See* City of Chicago, *Gang and Narcotic Related Violent Crime: 1993-97* (June 1998). In fact, the record from the years that the ordinance was enforced is quite mixed: in 1994, gang related homicides increased faster than non–gang related homicides (27% to 3%); but in 1995, gang related homicides decreased faster than non–gang related homicides (26% to 4%). The record from the post-enforcement years also is mixed: in 1996, gang related homicides increased by 7% while non–gang related homicides decreased by 8%; whereas in 1997, gang related homicides decreased by 19% while non–gang related homicides increased by 1%. Significantly, taking the two post-enforcement years as a whole, gang related homicide decreased by 13%, while non–gang related homicide decreased by just 7%.[40]

Reason and logic make plain the exceedingly speculative fit between the City's ordinance and its objective of preventing gang criminality. The likelihood that providing police the ability to disperse a group that might contain a gang member will prevent the commission of a gang-related crime is remote. First and foremost, the fact that such an assemblage is poised to commit a crime is sheer speculation. In fact, nothing in the ordinance even requires such a determination in any given case. Second, the City acknowledges that gangs do not typically commit crimes in

[39] Instead of confronting the entirety of its own data set, the City selectively emphasizes the years that support its theory and ignores the years that undermine its theory. *See* Br. 16 & n.11.

[40] Similarly, the report of Chicago Police Officer Louis J. Gaal indicates that gang related homicides *increased* during the first two years of enforcement of the ordinance, and decreased only during the third. *See* Louis J. Gaal, *Statistics of Anti-Gang Loitering Ordinance* (Jan. 5, 1996). One commentator incorrectly cites the report of Officer Gaal as empirical evidence that gang-related homicides *decreased* during all three years of enforcement. *See* Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 Am. Crim. L. Rev. 191, 225 & n. 117 (1998). The City in turns cites this commentator's conclusions as evidence that the ordinance reduced gang crime. Br. 16 n. 11.

full view of the police. It is difficult to imagine that forcing a gang member contemplating criminal activity to move around the corner, into the alley, or into his house will in any significant number of cases prevent the contemplated crime from taking place. If the threat of incarceration that exists by virtue of laws already on the books is not a sufficient deterrent, it strains reason to pretend that the ability to disperse will be.

The ordinance fares just as poorly with respect to the least restrictive means requirement. Indeed, it is the antithesis of a narrowly drawn enactment. In the name of preventing gang crime, it sweeps up a vast array of innocent and, in many instances, constitutionally protected conduct. In any given case, whether enforcement of the ordinance prevents a crime from happening or whether it merely abridges one's fundamental rights is anybody's guess. And by gratuitously extending the ordinance to prohibit loitering even by non–gang members, the City Council guaranteed that the police could disperse or arrest myriad individuals engaged in harmless, legitimate, and often constitutionally protected activities and posing no threat whatsoever to the interests the ordinance purports to protect.[41]

The City defends this course as a valid "prophylactic" measure that "weigh[s] the benefits of prevention against the cost of prohibiting conduct that is sometimes innocent," Br. 43, but none of the cases the City cites supports its ordinance. To begin with, none of the City's "prophylaxis" cases involved liberty interests commensurate with those at stake in this case. In *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (cited at Br. 43), for example, the Court

[41] It was for these reasons that a number of individuals, including aldermen, expressed serious concerns about the ordinance causing the infringement of the basic freedoms of innocent people, both because of the vagueness of the ordinance and because innocent people might associate with individuals perceived to be gang members. *E.g.*, Supp. R. I at 11-13, 17-18, 37-38, 43-44, 97-98, 101-02; Supp. R. II at 14-15, 57, 69-71, 77, 79, 85-89, 219, 229-32.

explained that the challenged legislation – a state law that required employers to afford employees four hours paid leave on election day – was "in form a minimum wage requirement," and that the state legislatures "may within extremely broad limits control practices in the business-labor field . . . ."; *see also Washington v. Glucksberg*, 117 S. Ct. 2258, 2271 (1997) (cited at Br. 43) ("[T]he asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."); *Lewis v. United States*, 445 U.S. 55, 65 n. 8 (1980) (cited at Br. 43) ("These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties.").

While "prophylactic" legislation can, if narrowly tailored, have the virtue of "prevent[ing] crime before it occurs," Br. 10, it likewise has the vice, duly noted by this Court, of "encompass[ing] more than the core activity prohibited." *United States v. O'Hagan*, 117 S. Ct. 2199, 2217 (1997). For that reason, the Court has long recognized that prophylactic deprivations of personal liberty are inconsistent with our fundamental conceptions of criminal justice and are ripe for abuse by the authorities charged with their enforcement. *E.g.*, *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.") (citations omitted); *Papachristou*, 405 U.S. at 171 ("The implicit presumption in these generalized vagrancy standards – that crime is being nipped in the bud – is too extravagant to deserve extended treatment."); *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 116 S. Ct. 2309, 2329 (1996) (Thomas, J., concurring in judgment and dissenting in part) ("Broad prophylactic bans on campaign expenditures and contributions are not designed with the precision required by the First Amendment because they

sweep protected speech within their prohibitions."); accord, *e.g.*, *Thornhill v. State of Alabama*, 310 U.S. at 105.[42]

The contrast between Chicago's ordinance and the prophylactic curtailments of liberty that this Court has countenanced is stark. Under Chicago's scheme, every group of two or more people that contains even a single suspected gang member and remains, apparently without a purpose, in a single public place is deemed by legislative fiat to present such a danger to the community that all of its members must be ordered to disperse on pain of arrest and possible incarceration. The terms of the ordinance and its implementing administrative order are mandatory; no individualized assessment of dangerousness is required or, for that matter, permitted, and once an officer has determined that a suspected gang member is present, everyone – suspected gang members, strangers to the police, and even known non–gang members – is subject to dispersal and arrest. *See* Pet. App. 61a, 72a. As a result, the ordinance is wildly overinclusive. On its face, the ordinance applies to two friends waiting to meet a third for dinner; to a mother and her son getting a breath of fresh air on the sidewalk in front of their home; to high-school sweethearts holding hands on a park bench; to classmates hanging out across the street from their school during their lunch break; and to teammates waiting for an open basketball court (unless, of course, they

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[42] Indeed, the presumption underlying the City's ordinance – namely, that certain groups of individuals pose such a threat of future criminality that they should be ordered to disperse on pain of arrest and possible incarceration – should appear a familiar one to this Court. The Court has had several occasions to review laws that abridge personal liberty on the basis of some prediction of future dangerousness, and it has upheld such laws only under narrowly defined circumstances that bear no resemblance to those now at bar. Compare, *e.g.*, *Salerno*, 481 U.S. at 750-51, with *Foucha v. Louisiana*, 504 U.S. 71, 81-82 (1992). Moreover, Chicago's ordinance paints with far broader a brush than the state law *struck down* in *Foucha*, which at least required a determination that the individual defendant posed some threat to the community before any deprivation of liberty could attach.

were paying enough attention to an ongoing game to be considered "apparent" spectators by onlooking police). Thus, even where enforcement is objectively limited to groups including at least one suspected gang member, the ordinance sweeps up conduct wholly unrelated to the violence, drug-trafficking, vandalism, and other "brazen" and "visibly lawless" behavior at which the City claims the ordinance is directed.

Finally, the fact that the City has ample alternative means of addressing the problems it claims the ordinance is needed to solve is proof positive that the ordinance is not the least restrictive means for advancing the interests at stake. As the Illinois Supreme Court correctly observed, "[m]any of the offensive activities the city claims the gang loitering ordinance will deter are already criminal acts." Pet. App. 19a. Among other things, Illinois statutes proscribe "intimidation," 720 ILCS 5/12-6; "compelling organization membership of persons," 720 ILCS 5/12-6.1; "aggravated intimidation," 720 ILCS 720/6.2; "the assembly of two or more persons to do an unlawful act," 720 ILCS 5/2-1(2); and "mob action," 720 ILCS 5/25-1.[43] Such laws serve the same ends as the ordinance, but do so by means "directed with reasonable specificity toward the conduct to be prohibited." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971); *see also Foucha v. Louisiana*, 504 U.S. 71, 82 (1982) (striking down preventive detention scheme where, *inter alia*, the state failed to "explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with

[43] In addition to the host of criminal remedies available under state law, the City also has available to it civil remedies, directed specifically at gang-related activities, under the Illinois Streetgang Terrorism Omnibus Prevention Act, 740 ILCS 147/1, *et seq*.

patterns of criminal conduct. These are the normal means of dealing with persistent criminal conduct.").

At the City Council hearings, this question – whether existing laws were adequate to deal with the problems of gang crime – was put to Deputy Superintendent Gerald Cooper, the lone representative of the Chicago Police Department and the only witness with extensive policing experience to testify at the hearings. Deputy Cooper's answer, on behalf of the City, is informative:

> ALDERMAN MOORE: Now, Alderman Steele has been asserting throughout the hearings that there are laws already existing on the books that address the problems that people have been testifying about today and Friday.
>
> Is that your assessment? Are there already laws and it's just a question of enforcement?
>
> MR. COOPER: I think there are already laws. I think there are already enough laws on the books at this point, criminal laws, criminal penalties which are much different than the ones that are articulated in the ordinance.
>
> But certainly, there is always going to be situations where there is no specific violation for or statute for, but for the most part and in the examples that people have been giving, I would think that 90 percent of those instances are actually criminal offenses where people, in fact, can be arrested.

Supp. R. II at 181-82. Later, Deputy Cooper was asked "[b]ottomline, what is the police department's position on this ordinance? Do you folks want it or would you just prefer that it not be on the books?" Supp. R. II 185. Again, his response was instructive:

> Under the appropriate circumstances, the ordinance can be a viable tool for the police. What I am suggesting, however, is that there is much more that can be done rather than an additional law on the books, and I would

> prefer that the – or I would rather suggest or request the City Council, in its infinite wisdom, begin to look at the totality of the problem as opposed to looking at it from a one-dimensional point of view.

Supp. R. II at 185-86. Deputy Cooper's testimony reveals that separate and apart from the ordinance, the City has available to it "other, reasonable ways to achieve [its] goals with a lesser burden on constitutionally protected activity . . . ." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

Chicago's ordinance is much more than "strong medicine." Br. 38. Whether it effectively prevents crime, promotes neighborhood stability, or furthers any other noteworthy state interest is a dubious proposition in and of itself. It is clear beyond peradventure though that the ordinance comes no where close to being a narrowly tailored measure to combat those societal ills.

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In any event, the ordinance is not "rationally related to legitimate government interests." *Glucksberg*, 117 S. Ct. at 2271. The Illinois Supreme Court struck down the Chicago ordinance on this basis, holding that the law was "utterly unreasonable." Pet App. 18a. The court reasoned that the ordinance was "arbitrarily aimed at persons based merely on the suspicion that they may commit some future crime," without regard to "whether they are actually gang members or have committed any crime." *Id.* This ruling is sound and alone warrants affirmance.

The ordinance does not target the commission of crime, or even the conditions that lead to crime. Instead, it targets in blunderbuss fashion all persons who appear to be doing nothing in public, whether or not they are gang members, and whether or not they are committing or planning to commit a crime, merely because they happen at a particular moment to be with a suspected gang member. In this way, the law sweeps innumerable innocent activities and law-abiding

citizens off of the streets.

Thus, the ordinance is doubly irrational. First, it arbitrarily punishes countless individuals who have done nothing criminal – or, for that matter, suspicious, beyond appearing idle in public with a suspected gang member. *See Fenster v. Leary*, 229 N.E.2d 426, 430 (N.Y. 1967) (striking down vagrancy law under rationality review because law impermissibly targeted "suspected criminals, with respect to whom the authorities do not have enough evidence to make a proper arrest or secure a conviction on the crime suspected").

Second, by driving innocent persons from the public way, and by attacking the social bonds that might help gang members to live a better life, the ordinance destabilizes the very communities the City seeks to help. *See Hayes v. Municipal Court*, 487 P.2d 974, 980 (Okl. Ct. App. 1971) (striking down loitering law under rationality review, stating that "[t]o forbid people from being on public streets as a preventive measure rings of a totalitarian police state operated for the efficiency of the government and not in the interest of a free people. All citizens are justly concerned about crime. But, that concern must take rational expression and not become a mindless fear that erodes the rights of a free people.").

In short, the ordinance is so arbitrary and irrational that it cannot survive scrutiny under even a deferential standard of review.

III. THE ORDINANCE IS SUBSTANTIALLY OVERBROAD IN VIOLATION OF THE FIRST AMENDMENT.

It is hardly a controversial proposition that laws that interfere with citizens' peaceful enjoyment of public streets, sidewalks, and parks directly implicate all of the closely allied First Amendment rights of speech, assembly, and association. *E.g.*, *Coates v. City of Cincinnati*, 402 U.S. 611,

615 (1971) (loitering ordinance directly implicates right of assembly); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-91 (1965) (loitering ordinance directly implicates First Amendment freedoms). Nor is it surprising that an ordinance targeted at public assembly, which makes no effort to distinguish between lawful and unlawful gatherings, sweeps within its broad reach numerous associational activities that are not only innocent but constitutionally protected. From the City's point of view, the extraordinary breadth of the ordinance is the mark of its effectiveness. This Court, however, has taken a very different approach, repeatedly stressing that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

A law that lacks "precision of regulation" can be fatally overbroad in two distinct ways: "where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decision maker, and . . . where the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992) (citations omitted).[44] Moreover, "[u]nder the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face 'because it threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or

[44] The Court has explained that in assessing whether a legislative enactment burdens a substantial amount of protected activity, it "evaluate[s] the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n. 6 (1982). This is so because "ambiguous meanings cause citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Id.* (internal quotation marks and alterations omitted).

undertake to have the law declared partially invalid.'" *Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 574 (1987) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985)).

The ordinance is unconstitutional under both strands of the overbreadth doctrine because it reaches vast amounts of constitutionally protected conduct, not only of the class of suspected gang members at whom it is purportedly aimed, but also of the millions in the general population of the City of Chicago. Further, the ordinance abridges these vital First Amendment freedoms in the very places in which they should be most vibrant – traditional public fora.

The overbreadth of Chicago's ordinance is neither speculative nor marginal. A mother talking with her child on the street corner will most likely be ordered to move on and possibly be arrested by a police officer who has reason to believe that her child belongs to a gang. Likewise, an anti-gang counselor will lose the public way as a site for locating and meeting with troubled youths.[45] Such results are not just irrational. They directly and substantially burden associational activities – both intimate and expressive – that the First Amendment carefully safeguards. Moreover, this is a paradigmatic case for invocation of the overbreadth doctrine precisely because the City has not even *attempted* in the ordinance to distinguish between gang members and non–gang members. And the latter are most likely to disperse – and sacrifice their associational rights – rather than risk arrest to preserve a later constitutional challenge. *E.g.*, *Jews for Jesus*, 482 U.S. at 574; *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). Public frustration with gang criminality cannot justify making criminals of all those who

[45] *E.g.*, Affidavit of Julio Matias, ¶¶ 4, 11 (Supp. R., Ex. A) (anti-gang counselor expressing fear of being arrested in connection with gang intervention activities). *See generally* Brief Amicus Curiae See Forever/The May Angelou Public Charter School.

may associate lawfully with suspected gang members any more than it can justify the ordinance's hopeless vagueness.

While the City pays lip service to the notion that the ordinance implicates no associational rights – *e.g.*, its hollow refrain that the ordinance "is directed at loitering, pure and simple," Br. 18 – it ultimately concedes, as it must, that the terms of the ordinance have the potential to reach activity protected by the First Amendment. Br. 22-23. But by cobbling together overly narrow constructions of the associational rights at issue with its unsubstantiated (and unsound) claim that the "no apparent purpose" feature of the ordinance will provide an *ad hoc* safe harbor for First Amendment activity, the City attempts to quantify the ordinance as covering only the "tiniest fraction" of protected activity. Br. 23. As shown below, the City's overbreadth construct is seriously at odds with law and human experience.

A. The Ordinance Substantially Burdens Intimate Association.

"The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. . . . Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others." *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984); *see also Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987).

The Court has wisely eschewed identifying with precision the range of relationships protected by the right of intimate association, but it has had occasion to give examples. Among those that have been deemed entitled to protection are ones that attend the creation and sustenance of a family,

including marriage, childbirth, the raising and education of children, and the choice of living arrangements among relatives. *E.g.*, *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977); *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). At the same time, the Court has "not held that constitutional protection is restricted to relationships among family members." *Rotary Int'l*, 481 U.S. at 545. Examples of associations the Court has deemed unworthy of protection are "large business associations," *Roberts*, 468 U.S. at 620, and "chance encounters in dance halls," involving "hundreds of teenagers," *City of Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989). In short, "[d]etermining the limits of state authority over an individual's freedom to enter into a particular association . . . entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Roberts*, 468 U.S. at 620.

Even actual gang members – not to mention suspected gang members and non–gang members – have relationships that qualify for protection under the rubric of intimate association. So do their parents, siblings, spouses, and children. These persons – gang members, actual or suspected, on the one hand, and their parents, siblings, spouses, and children, on the other – are all entitled to the full measure of constitutional protection afforded their intimate relationships. Anyone familiar with urban life can appreciate that there is much in the way of constitutionally cognizable intimate association that takes place on the street corner, on the sidewalk, and in the neighborhood park. It is in these places that people, including gang members, spend important and meaningful time with parents, siblings, children, and neighbors. Indeed, in many neighborhoods where the sidewalk and streets often serve as an extension of the home,

this kind of activity is a vital piece of the fabric of life. But under the ordinance, the right to engage in this broad range of intimate – and innocent – association is subject to the Hobson's choice of dispersal or arrest. Both significantly burden the right of intimate association.

The City casually dismisses the ordinance's serious impingement on intimate associational rights by proclaiming that "there is nothing that is 'intimate' about loitering in public." Br. 21. But nothing in this Court's decisions suggests such a crabbed view of intimate association that would automatically deny protection to any activity that takes place out of doors. To the contrary, it is the nature of the association itself, not whether it happens to occur indoors or out, that triggers First Amendment protection. *See Roberts*, 468 U.S. at 618-19; *Rotary Int'l*, 481 U.S. at 545-46.[46] Nor does the reality of human experience jibe with the City's view. Additional examples abound. A suspected gang member, with other family members, watching his child at play; parents sitting in the park with their gang-member son; a father and son discussing the latter's job opportunities on the sidewalk in front of their home; even a suspected gang member proposing marriage to his girlfriend along Chicago's lakefront. The City's view not only belies an unfortunate class and cultural myopia, but also underscores forcefully the fact that the "no apparent purpose" feature of the ordinance does absolutely nothing to safeguard rights of intimate

[46] The City cites *Rotary International* and *Stanglin*. It cites *Rotary International* as authority for the broad proposition that "the right of intimate association does not extend to "activities carried on in the presence of strangers." Br. 21. The quoted portion is plucked out of context, however, and the *Rotary* Court merely considered the presence of strangers at – or, more accurately, the Rotary Club's policy of inviting of strangers to – its meetings as one factor among many that defeated the Club's claim that its activities were protected intimate association. The City cites *Stanglin* for the unremarkable proposition that the Constitution recognizes no generalized right of social association. Br. 21. Moreover, *Stanglin*, with its "chance encounters" among as many as 1,000 strangers, 490 U.S. at 22, is obviously of no particular guidance here.

association. If it is the City's position that intimate associational rights cannot by definition be exercised in public, *a fortiori* it will never be apparent to the City's police officers that an act of intimate association is occurring.

B. The Ordinance Substantially Burdens Expressive Association.

Chicago's ordinance also impinges the right of expressive association of both gang members and those who interact with them. This Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts*, 468 U.S. at 622. The City has all along conceded in this litigation, as it has had to, that the plain terms of the ordinance have the capacity to burden this right of expressive association. For example, the City acknowledged to the trial court that the ordinance could apply to members of a community outreach group who were attempting to persuade a gang member to leave his gang, Pet. App. 57a; to a minister arguing with gang members, Pet. Reply Br. Ill. App. Ct. 22; to a street corner seminar on President Clinton's economic programs, Pet. Br. Tr. Ct. 26-27; or to a debate over the constitutionality of the ordinance itself, Pet. Br. Ill. S. Ct. 43, so long as in each case a police officer reasonably believed a gang member to be present at the discussion.[47]

[47] The City has had occasion elsewhere to argue that gangs engage in expressive activity protected by the First Amendment. In seeking relief from an injunction restricting its investigations of First Amendment activities ("Decree"), the City represented to the court there as follows:

> Chicago gangs are ongoing organizations continually engaged in assorted criminal activity. However, because a gang may be or claim to be involved in First Amendment activity, the Decree inhibits the maintenance of records of gang membership . . . . Moreover, *gangs are increasingly engaged in political activities*. This means that investigations of gangs will increasingly implicate the Decree. Indeed, once a gang begins engaging in political

The fact that the ordinance reaches expressive association, and does so in a substantial way, is not some mere "hypothetical possibility." Br. 22. Organized social groups, from proselytizers to grassroots politicians, associate with gang members – often without outwardly apparent purposes. And as communities attempt to reclaim their troubled youth, gangs themselves have become increasingly engaged in community-based political activities that are traditionally protected as expressive association. *E.g.*, Pamela Constable, *"Peace Summit" Aims to Steer Young Latinos From Gang Violence*, Wash. Post, Apr. 4, 1996, at B5 (gang members formulating "peace plan" for Latino community development); Don Terry, *Chicago Gangs, Extending Turf, Turn to Politics*, N.Y. Times, Oct. 25, 1993, at A12 (gang involvement with health care, education, voter registration and supporting of candidates); *Gang Summit Ends With Call For Jobs*, L.A. Times, May 3, 1993, at A13 (policy positions of gang summit on employment and civil rights issues).[48]

activity, a substantial claim may be made that gang membership itself may be First Amendment information within the meaning of the decree.

Memorandum of City of Chicago in Support of its Motion to Modify the 1982 *Alliance* Consent Decree at 35, *Alliance to End Repression v. City of Chicago*, No. 74 C 3268 (N.D. Ill.) (filed 3/7/97) (citations omitted; emphasis added); *see also* Irving A. Spergel, *The Youth Gang Problem: A Community Approach* 120-24 (1995) (detailing active participation of Chicago street gangs in electoral politics during past several decades).

[48] *See also* Marcia Slocum Greene, *Cleaning Up A D.C. Community's 'War Zone'; Joined In A New Battle, Old Rivals Work To Erase Signs of Simple City's Brutal Past*, Wash. Post, Feb. 26, 1997, at B1; Marylynne Pitz, *Survivors of Gang Warfare Were Abundant At the Rally; Members of 4 Gangs Go To Rally For Peace*, Pittsburgh Post-Gazette, Sept. 3, 1996, at B1; George Papajohn, *Gangs Aren't Rookies in City Politics*, Chi. Trib., March 31, 1995, sec. 1 at 1; Doug Smith, *Valley Gang Members Join To Mark Peace Anniversary*, L.A. Times, Oct. 30, 1994, at B1; George Papajohn, *A Peek Behind Gang's Talk of Political Action*, Chi. Trib., Oct. 2, 1994, sec. 2 at 1; John Kass & George Papajohn, *Group's Rapid Success a Real Inside Story*, Chi. Trib., July 24, 1994, sec. 4 at 1; *Jackson Tells Gang Members They're At Cutting Edge of Civil Rights*

The ordinance is all the more inimical to the First Amendment because the areas most affected by the ordinance – public streets, sidewalks, and parks – are the quintessential public fora. *United States v. Grace*, 461 U.S. 171, 180 (1993); *Boos v. Barry*, 485 U.S. 312, 318 (1988). Restrictions on the liberties guaranteed by the First Amendment are most abhorrent within those areas that have "immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)); *see also International Soc'y for Krishna Consciousness, Inc.*, 505 U.S. at 678-79; *Frisby v. Schultz*, 487 U.S. 474, 481 (1988); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985). Public streets, the Court has held, are "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988).

Again, the reality of the human experience in urban neighborhoods – particularly in poor and minority areas – forcefully illustrates the wide net that the ordinance casts over expressive association. The streets and sidewalks do not function exclusively as fora for large-scale rallies or formal demonstrations. Most discussion of matters of public interest and concern is informal and private; neighbors discussing the state of city services, the conditions of alleys, the arrival of Asian beetles, or their views about street gangs are all associating for expressive purposes but will rarely exhibit a purpose "apparent" to an objective observer. In fact, formal demonstrations, marches, and parades are few in number compared to the everyday use of the streets for expressive association. But the ordinance operates to burden this

Push, L.A. Times, Oct. 25, 1993, at A16; *Gang Members Turn From Streets to Talk of Peace*, N.Y. Times, May 2, 1993, at 1.

infinite variety of expressive association in one of two ways: dispersal or arrest.

The ordinance's burden on associational rights is further exacerbated by its "guilt by association" feature. As explained in *Healy v. James*, 408 U.S. 169, 186 (1972), government cannot "impos[e] criminal sanctions or deny[] rights and privileges solely because of a citizen's association with an unpopular organization . . . [G]uilt by association alone, without establishing that an individual's association poses the threat feared by the Government, is an impermissible basis upon which to deny First Amendment rights." *Id.* at 186 (citations and internal quotation marks omitted); *see also Aptheker v. Secretary of State*, 378 U.S. 500, 514 (1964) ("The prohibition against travel is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe. The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individual's knowledge, activity, commitment, and purposes in and places for travel."); *cf. Mitchell v. Prunty*, 107 F.3d 1337, 1342 (9th Cir. 1997) (Kozinski, J.) (rejecting as "guilt by association" the argument that gang membership alone is evidence that defendant aided and abetted a murder).[49]

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[49] Contrary to petitioner's suggestion, *e.g.*, Br. 5, n. 3; Br. 35, n. 23, the ordinance in this respect bears little resemblance to other statutory schemes that are directed against ongoing criminal enterprises. For example, there is no criminal liability under the substantive provision of the federal Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961, *et seq.*, unless the government can prove that an employee or associate of a criminal enterprise conducted or participated in the enterprise's affairs "through a pattern of racketeering activity," *i.e.*, through the commission of two or more enumerated crimes. *Id.* § 1962(c). Nor is there liability under the conspiracy provision of RICO, *id.* § 1962(d), without proof of the defendant's "inten[t] to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense . . . ." *Salinas v. United States*, 118 S. Ct. 469, 477 (1997). State laws that target gang membership likewise require proof of criminal conduct or intent before imposing punishment. *E.g.*, Cal. Penal Code § 186.22(a) (California Street Terrorism Enforcement and Prevention ("STEP") Act does not punish gang membership unless member had "knowledge" that gang has engaged in "pattern of criminal gang activity," and member "willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang"); *id.* at § 186.22(b)(1) (STEP Act does not enhance criminal sentence unless gang member committed felony "for the benefit of, at the direction of, or in association with any criminal street gang," and "with the specific intent to promote, further, or assist in any criminal conduct by gang members"); Iowa Code § 723A.2 (Iowa Criminal Street Gang Statute does not punish gang membership unless member "willfully aids and abets any criminal act committed for the benefit of, at the direction of, or in association with any criminal street gang"); *Jackson v. State of Indiana*, 634 N.E.2d 532, 534 (Ind. Ct. App. 1994) (Indiana Gang Statute, Ind. Stat. Ann. §35-45-9-3, does not punish gang membership without proof of participation "with knowledge of the gang's illegal advocacy of felonies or batteries," and "with specific intent to further, facilitate, or accomplish the substantive criminal conduct"); *see also* 740 ILCS 147/10 (Illinois Streetgang Terrorism Omnibus Prevention Act permits civil action against gang member for equitable and monetary relief only where member "knowingly acts in the capacity of an agent for or accessory to, or is legally accountable for, or voluntarily associates himself with a course or pattern of gang-related criminal activity").

In its effort to dismiss the substantial burden the ordinance places on expressive association, the City advances two fictions. First, it inexplicably quantifies the amount of expressive association at stake as the "tiniest fraction." Br. 23. As support for this extraordinary conclusion, the City tells us that none of the Respondents was doing "anything [ ] protected by the First Amendment." Br. 22. The record of course furnishes no particularized facts to support this sweeping assertion. Moreover, even if the City's assertion were true, it would completely beg the question of facial overbreadth since that question concerns not the details of Respondents' arrests but rather whether there is "a significant *potential* for unconstitutional application of the ordinance." *City of Houston v. Hill*, 482 U.S. 451, 458 n. 6 (1987) (emphasis in original); *see also City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 759 (1988); *Kolender v. Lawson*, 461 U.S. 352 (1983); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Shuttlesworth v. City of Birmingham*,

382 U.S. 87 (1965). On that question a far more pertinent statistic is the City's assertion that its officers issued some 45,000 dispersal orders that were obeyed under the authority of the ordinance. Br. 16.

The City's second attempt to trivialize the ordinance's burden on expression is its assurance that most of whatever little expressive association transpires on the streets of Chicago will have an "apparent purpose." Agreement from this Court on this proposition would amount to an extraordinary retreat from the teaching of this Court's jurisprudence in this area. This point cannot be overemphasized. Conditioning the exercise of a fundamental right such as expressive association upon the "moment-to-moment judgment of the policeman on his beat," *Smith v. Goguen*, 415 U.S. 566, 575 (1974) (quoting *Gregory v. City of Chicago*, 394 U.S. 111, 120 (1969) (Black, J., concurring)); *see also Kolender*, 461 U.S. at 358; *Shuttlesworth*, 382 U.S. at 90, is something this Court has vigilantly guarded against. While anyone will surely recognize a parade or a formal demonstration for what it is, the opportunities for expressive association beyond these isolated, large-scale events are enormous, not just some "tiny fraction." And in that gulf of expressive opportunities, the City's conjecture that citizens' purposes will be apparent to the police simply is not sufficient protection. The preservation of First Amendment freedoms should not be made to hang in the balance of the ability of individual police officers to divine the purposes of persons exercising those rights.[50]

[50] The avowed target of Chicago's ordinance is criminal street gang activity. However if the City's law is upheld, any ordinance using the City's definition of "criminal street gang" – which, in the City's words, "largely track[s] the definition of an 'enterprise' . . . in the federal racketeering statute" (Br. 4-5 n. 3) – could be used prospectively to subject members of countless grass roots advocacy organizations to similar restraints on speech and association without any individualized judicial finding of wrongdoing. Groups such as ADEPT,

C. The City Wrongly Asserts That The Ordinance Passes Scrutiny As An Incidental Burden On First Amendment Rights.

Because the ordinance substantially burdens First Amendment rights, it is overbroad and invalid on its face. *Jews for Jesus*, 482 U.S. at 574. Starting from the contrary – and faulty – premise that the ordinance only burdens speech incidentally, the City argues that the ordinance should be subjected to an intermediate level of scrutiny like that used in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), or for time, place, and manner restrictions, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), and that the ordinance easily satisfies such scrutiny. Br. 24-25. The only plausible explanation for the City's use of the intermediate test is its recognition that the ordinance flunks strict scrutiny, which it plainly does. *See* Part II.B, *supra*.

Even if the law warranted scrutiny of the ordinance as a mere time, place, and manner restriction, the ordinance would not survive. Government may impose time, place, and manner regulations "provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information.'" *Ward*, 491 U.S. at 791 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Relatedly, under the *O'Brien* test, "the governmental interest must be unconnected to

Operation Rescue, Greenpeace, ACT-UP, and hundreds of other political organizations whose members may have engaged in past criminal activities – such as mob action, 720 ILCS 5/25-1(2) – as part of a course of civil disobedience would be subject to arrest and prosecution anytime two of their members gather in public with "no apparent purpose." *Cf., National Organization of Women, Inc. v. Scheidler*, No. 86 C 7888 (N.D. Ill.) (jury finding that anti-abortion group, Pro-Life Action Network, was RICO enterprise and that anti-abortion groups and protesters, including Operation Rescue, participated in its operation), *on remand from* 510 U.S. 249 (1994).

expression." *Texas v. Johnson*, 491 U.S. 397, 407 (1989). The ordinance meets none of these requirements.

Here, the City's interest is not unconnected to association. Rather, it *targets* association, and includes within its sweep myriad forms that are both entirely innocent and constitutionally protected. Nor is the ordinance content-neutral. Persons subject to the ordinance are identified by their status as purported gang members. With respect to persons who are not gang members, but wish to engage in various forms of expression and association with gang members, the ordinance similarly imposes a content-based disability forbidden in the decisions of this Court. *Simon & Schuster*, 502 U.S. at 115-16 (identity of speaker not basis for content-based disincentives on expression); *Boos*, 485 U.S. at 312 (ban on particular class of derogatory signs); *Police Department v. Mosley*, 408 U.S. 92 (1972) (ban on all but labor picketing is content-based); *Bellotti*, 435 U.S. at 784-85 (legislature not permitted to dictate which speakers may address public issue). Contrary to the City's position, Br. 25, the conclusion that the ordinance is content-based flows from its selective designation of persons disqualified from speaking and associating on the public ways, not from its impact on or relation to particular private conversations.

Nor is the ordinance narrowly tailored to serve the City's substantial interests in crime prevention and maintenance of public order. In a variety of situations, this Court has held that restrictions on expression and association are not narrowly drawn where government can enact or enforce specific laws addressing particular crimes or civil ills. Of particular note is *DeJonge v. State of Oregon*, 299 U.S. 353, 365 (1937), where the Court directed the State to enforce valid laws protecting public order in preference to criminalizing peaceable assembly. *See also Village of Schaumburg*, 444 U.S. at 636-37 (charitable solicitation; crime and fraud); *Coates*, 402 U.S. at 614 (assembly and

association; traffic and public order laws); *Schneider v. State of New Jersey*, 308 U.S. 147, 164 (1939) (leafletting; littering laws).

Finally, denial of the public ways as a gathering place for expression and association does not leave open ample alternative channels for communication. Gang members and those who would associate with them cannot be confined to formal modes of expression or to a state of constant movement. Br. 27. They are entitled, as are any other citizens, to use the streets for informal assembly, exchanging ideas, and discussing public questions. *Hague v. CIO*, 307 U.S. 496, 515-516 (1939); *see also United States v. Kokinda*, 497 U.S. 720, 728 (1990) (public sidewalk as facilitating daily life and commerce of neighborhood or city). When expression and association are banned in specific locations other than quintessential public forums, the public streets are often the only alternative. *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981) (state fairgrounds); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (posting signs prohibited; leafletting on street allowed); *Frisby*, 487 U.S. at 483 (single-home targeting banned; forum otherwise available).[51]

So long as gang members and those who would associate with them behave lawfully on the public ways, their rights,

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[51] In arguing that the ordinance leaves open adequate alternative channels for communication, the City claims that the ordinance will only be enforced in those "limited areas" designated pursuant to General Order 92-4. Br. 28. At the same time, despite a request under the Illinois Freedom of Information Act and subsequent FOIA litigation, the City has refused to disclose to the public which areas have been so designated, claiming that to do so would impair the ability of the police to fight crime. *See* note 20, *supra*. Nevertheless, it is clear that the areas designated are substantial; as noted above, the ordinance was enforced in twenty-four of twenty-five police districts, and was enforced on streets, in parks, at schools, and at housing projects. *See* p. 25, *supra*. In these circumstances, no one will ever know where in the City he can safely stand with others in public, or even where in public he can safely remove to if ordered under the ordinance to disperse; the "alternative channels" cited by the City are thus illusory.

like those of the general public, should be subject to the rule long applied by this Court. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981) (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1989)).

IV. THE ORDINANCE VIOLATES THE EIGHTH AMENDMENT BY CRIMINALIZING STATUS.

Criminalization of status alone imposes cruel and unusual punishment in violation of the Eighth Amendment. *Robinson v. California*, 370 U.S. 660, 666-68 (1962). Accordingly, "criminal penalties may be inflicted only if the accused . . . has committed some *actus reus*." *Powell v. Texas*, 392 U.S. 514, 533 (1968) (plurality opinion). Thus, while the state may criminalize the *conduct* of public drunkenness, even when committed by an alcoholic, *Powell*, 392 U.S. at 532, it may not criminalize the *status* of narcotics addiction. *Robinson*, 370 U.S. at 666-67. Together, *Robinson* and *Powell* prohibit the use of the penal power of the state against persons, defined by their status, solely upon the belief that they are more prone to criminal behavior than others.

Chicago's ordinance unconstitutionally criminalizes both the status of gang membership, and the status of being an associate of a gang member (broadly defined by the ordinance to include anyone who for any reason is with a suspected gang member). The offense the ordinance purports to create lacks an *actus reus* – the foundation of all criminal statutes that ensures that penalties are inflicted only upon those who have committed some culpable act. *See* 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law*, §§ 3.2(b), 3.2(c), at 273-78 (1986). The ordinance is thus constitutionally infirm.

The City argues that the ordinance proscribes the "act" of loitering. Br. 45. However, failure to exhibit an apparent

purpose at every moment that one is in public with others cannot be the *actus reus* needed to save the ordinance. This "act" might include such reflexive, everyday conduct as talking, strolling, eating, sitting on a park bench, waiting to meet a friend, waiting outside a laundromat for clothes to dry, waiting to hail a cab, resting during a jog, waiting in a doorway for the rain to stop, or just enjoying the fresh air on a hot day. Everyone is certain to engage in such unavoidable conduct. In many communities, including Chicago's lower income neighborhoods, such public behavior is virtually involuntary: school might be out, jobs might be scarce, home might be without air conditioning, and banishment from the public way might mean loss of all social support and resources. *Cf. Pottinger v. Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992) ("arresting the homeless for harmless, involuntary, life-sustaining acts such as sleeping, sitting or eating in public is cruel and unusual"); *Church v. Huntsville*, No. 93-C-1239-S; 1993 WL 646401, *1 (N.D. Ala. Sept. 25, 1993) (enjoining policy of arresting persons "solely because of their status as homeless persons, for walking, talking, sleeping, or gathering in parks or other public places"), *vacated on other grounds*, 30 F.3d 1332, 1347 (11th Cir. 1994).

Robinson would be rendered a dead letter if *any* act, no matter how automatic and ubiquitous, could constitutionalize what is otherwise an unconstitutional status crime. The City might criminalize the "act" of sitting on a park bench when performed by a homeless person, or the "act" of getting out of bed in the morning when committed by an alcoholic. By the City's reasoning, the statute in *Robinson* might itself have been saved had the state simply explained that it was criminalizing not the status of drug addiction, but the "act" of failing to leave the State of California.

Here, the City concedes that the ordinance is a "prophylactic" measure intended to "stop crime before it

occurs," Br. 10, 14 – which is to say, the ordinance punishes a commonplace activity in an effort to remove individuals of a particular status from the public way before they commit a crime.[52] Of course, as to the associates of suspected gang members, the nexus between status and possible criminality is especially weak. *See Scales v. United States*, 367 U.S. 203, 224-25 (1961) ("In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . , that relationship must be sufficiently substantial to satisfy the concept of personal guilt . . . ."). In short, appearing to do nothing cannot supply the necessary *actus reus*.[53]

The City also argues that the ordinance proscribes the "act" of disobeying a police order to move on. Br. 45. However, disobedience of an unconstitutional police order cannot supply the *actus reus* necessary to save the ordinance. *Wright v. Georgia*, 373 U.S. 284, 291-92 (1963); *cf. Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-91 (1965). Thus, neither of the so-called acts identified by the City can camouflage the fact that the ordinance impermissibly punishes the status of gang membership. As the Illinois Appellate Court concluded, "the Chicago

[52] The selective, status-based operation of the ordinance defeats any comparison of this case to *Powell*, where all persons, alcoholic or not, were prohibited from committing the harmful act of public drunkenness. 392 U.S. at 532-35.

[53] The very cases cited by the City contradict its claim that "loitering alone can constitute the required conduct." Br. 45 n. 26. In fact, each case upheld a loitering ban on the grounds that the law also required proof of specific intent to commit a separate and criminal act. *See People v. Superior Court*, 758 P.2d 1046, 1049-50 (Cal. 1988) (ban on loitering "for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act"); *State v. Armstrong*, 162 N.W.2d 357, 360 (Minn. 1968) (ban on loitering with the "proved intent to commit an unlawful act"); *City of Tacoma v. Luvene*, 827 P.2d 1374, 1383 (Wash. 1992) (drug loitering ordinance interpreted to require proof of "actual intent" to commit a drug crime).

ordinance prohibits gang members from loitering because they are gang members, not because they are loitering." Pet. App. 34a-35a.

Chicago's ordinance has little in common with the other statutes discussed by the City. Br. 45-46. Statutory rape laws, unlike the ordinance, prohibit an *actus reus*: sexual relations with an underage individual is an affirmative act. Equally inapposite is the federal ban on firearm possession by a convicted felon, upheld in *Lewis v. United States*, 445 U.S. 55 (1980). The act of acquiring and possessing a gun is a far cry from the "act" of being in public without an apparent purpose. Indeed, the purchase and ownership of firearms is heavily regulated at virtually all levels of government, largely because of the self-evident dangers guns pose to society. Chicago's ordinance is more like a law that punishes convicted felons for inadvertently being near a gun store, whether or not they actually purchase a gun. Furthermore, this Court repeatedly has recognized that government may restrict the activities of convicted felons, *e.g.*, *id.* at 66; the status of criminal conviction is, accordingly, constitutionally unique.

The City may, without doubt, criminalize behavior that creates "health and safety hazards." Br. 46 (quoting *Powell*, 392 U.S. at 532). What it cannot constitutionally do is impose criminal penalties solely on the basis of status combined with some pervasive, unremarkable activity which is practically impossible for any person not to engage in. Accordingly, Chicago's ordinance violates the Eighth Amendment by banishing from the public way a class of individuals defined by their status and not their actions.

V. THE ORDINANCE VIOLATES THE FOURTH AMENDMENT BY REQUIRING ARREST WITHOUT PROBABLE CAUSE.

Chicago's ordinance is, in the words of the Appellate Court of Illinois, "a transparent attempt to avoid the probable cause requirement." Br. 35a. Its clear purpose is to authorize the arrest of gang members – and anyone with a gang member[54] – upon mere suspicion of future criminal activity, based on their affiliations with groups whose members have committed crimes in the past. The City admits that it passed the ordinance because, while gang members are responsible for "violence, drug-dealing and vandalism," they are able to "avoid arrest by committing no offense punishable under existing laws when they know the police are present." Pet. App. 60a. Indeed, the City concedes that the ordinance is a "prophylactic" measure intended to "stop crime before it occurs." Br. 10, 14.

In short, the ordinance makes it a crime to look suspicious. It authorizes arrest based upon a generic suspicion that someone might commit some unspecified crime sometime in the future if he is allowed to continue to associate in public with another who is suspected of belonging to a gang. This violates core Fourth Amendment principles. *Wong Sun v. United States*, 371 U.S. 471, 479 (1963) ("It is basic that an arrest . . . must stand upon firmer ground than mere suspicion . . . ."); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169 (1972) ("Arresting a person on suspicion . . . is foreign to our system, even when the arrest is for past criminality."). Indeed, the Court determined in *Terry v. Ohio*, 392 U.S. 1 (1968), that if a police officer has only a reasonable suspicion that a crime is afoot, the Fourth Amendment permits the officer only to stop and frisk

[54] *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) ("But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.").

the suspect. The Chicago ordinance would subvert this "narrowly drawn," *id.* at 27, exception to the requirement of probable cause.

This Court repeatedly has struck down laws that, like Chicago's ordinance, attempt to end run the requirements of the Fourth Amendment. *Berger v. State of New York*, 388 U.S. 41 (1967) (statute authorizing eavesdropping upon mere "reasonable belief"); *Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465 (1979) (statute authorizing search of every person arriving in Puerto Rico); *Payton v. New York*, 445 U.S. 573 (1980) (statute authorizing warrantless entry into private residences to make felony arrests); *see also Illinois v. Krull*, 480 U.S. 340, 362 (1987) (O'Connor, J., dissenting) ("Statutes authorizing unreasonable searches were the core concern of the Framers of the Fourth Amendment.").

Moreover, lower courts have held that certain loitering laws violate the Fourth Amendment, reasoning that "the crime prevention components of loitering statutes are aimed at suspected or potential rather than incipient or observable conduct." *United States ex rel. Newsome v. Malcolm*, 492 F.2d 1166, 1172 (2nd Cir. 1974), *aff'd on other grounds, Lefkowitz v. Newsome*, 420 U.S. 283 (1975); *see also Powell v. Stone*, 507 F.2d 93, 96 (9th Cir. 1974), *rev'd on other grounds*, 428 U.S. 465 (1976); *Farber v. Rochford*, 407 F. Supp. 529, 533 (N.D. Ill. 1975). Similar criminal statutes have also been invalidated by lower courts on this basis. *E.g., Hall v. United States*, 459 F.2d 831 (D.C. Cir. 1971) (striking down prohibition of vagrant's failure to give good account of himself); *People v. DeFillippo*, 262 N.W.2d 921, 924 (Mich. App. Ct. 1977) (striking down prohibition of refusal to produce identification during a *Terry* stop), *rev'd on other grounds*, 443 U.S. 31 (1979).

While the City claims that its police officers will have probable cause to believe that the ordinance has been violated, Br. 49 – *i.e.*, that a person is doing nothing in the

presence of a suspected gang member – legislation "may not . . . authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct." *Sibron v. New York*, 392 U.S. 40, 61 (1968); *see also Kolender v. Lawson*, 461 U.S. 352, 369 (1983) (Brennan, J., concurring) ("By defining as a crime the failure to respond to requests for personal information during a *Terry* encounter, and by permitting arrests upon commission of that crime," legislation violated the Fourth Amendment).[55]

In short, the City cannot be allowed to make suspicion based on mere association a basis for arrest and incarceration without an individualized determination of probable cause that an actual crime has been committed.

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[55] Not to the contrary are three cases cited by the City. Br. 49 & n. 29. In *Michigan v. DeFillippo*, 443 U.S. 31 (1979), this Court recognized a good-faith exception to the exclusionary rule for arrests based on a statute subsequently held unconstitutional. As this Court explained in *Illinois v. Krull*, 480 U.S. 340, 355 n. 12 (1987), there is a difference between those Fourth Amendment cases that "simply evaluate[] the constitutionality of particular statutes" (e.g., *Berger* and *Torres*), and those that address "whether a good-faith exception to the exclusionary rule should be recognized" (e.g., *DeFillippo* and the case then at bar). Indeed, *DeFillippo* rested in significant part on the doctrine of qualified immunity, *id.* at 38 (discussing *Pierson v. Ray*, 386 U.S. 547 (1967)), which affords public officials a good-faith defense to § 1983 damages actions, even after a determination that they violated the Constitution. *County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1714 n. 5 (1998). Here, of course, the issue is the constitutionality of Chicago's ordinance, and not the good faith of the police officers who enforced it.

In *City of Milwaukee v. Nelson*, 439 N.W.2d 562, 572 (Wis.), *cert. denied*, 493 U.S. 858 (1989), the court upheld a loitering ordinance that, unlike Chicago's ordinance, did not criminalize suspicion. Rather, it required an individualized determination of an immediate threat to public safety, and allowed the individuals to avoid arrest by explaining themselves. And in *Walters v. Barry*, 711 F. Supp. 1125, 1142 (D.D.C. 1989), the court rejected a Fourth Amendment challenge to a juvenile curfew that again, unlike the Chicago ordinance, did not criminalize suspicion. Rather, it sought under the *parens patriae* power of the state to protect the well-being of juveniles, did not authorize arrest, and did not allow punishment by incarceration.

CONCLUSION

The judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

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CITY OF CHICAGO,

Petitioner,

v.

JESUS MORALES, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

Respondents and their amici level most of their fire at the gang loitering ordinance's use of the term "loiter." They claim that it is fatally vague, reaching all sorts of innocent or even constitutionally protected conduct. But the claim that the ordinance is invalid because "[p]eople of ordinary intelligence cannot understand how to comply with its requirement" (Resp. Br. 18) is easily dismissed. After all, the ordinance does not prohibit "loitering," but rather only disobedience by loiterers to a police order to disperse. Anyone with even a modicum of common sense knows what is expected of him when he is ordered to move on.

Respondents' true quarrel with the ordinance is thus not with its clarity, but its objective—they believe there can be no justification for a law authorizing the police to order persons to disperse who are engaged in what respondents view as "everyday, innocent behavior." Resp. Br. 19. But by authorizing the police to take proactive action against groups of persons whose loitering creates special risks, this ordinance differs little from any other prophylactic enactment. Laws as diverse as those prohibiting the possession of syringes or the admission of minors into establishments that sell alcoholic beverages are directed at conduct that is often harmless, but which is nevertheless sufficiently likely to lead to substantive evils that a prophylactic ban is warranted. No principle of constitutional law forbids prophylactic enactments even though they will occasionally, or even frequently, reach conduct that is harmless or inoffensive.

Moreover, the gang loitering ordinance does not regulate all loitering, but instead only loitering by groups containing members of criminal street gangs. Even respondents do not doubt that this ordinance contains some enforcement standards—at a minimum, respondents do not

dispute that the ordinance applies only to persons who are standing still, nor do they doubt there are a variety of objective means available to determine gang membership. And requiring groups of persons containing gang members that remain in one place to disperse is not arbitrary, discriminatory, or irrational—if nothing else, the requirement is amply justified by the risk of drive-by shootings and other forms of gang violence that both gang members and those near them court when they loiter in public, presenting an inviting target for their rivals. The risk of violence that accompanies gang loitering also gives rise to an entirely reasonable apprehension on the part of law-abiding persons for their own safety when gangs loiter nearby. It is that fear, in turn, that ultimately leads law-abiding persons to lose faith in their communities—neighborhoods cannot prosper when people do not think it is safe to go outdoors. If the gang loitering ordinance did no more than encourage gangs to gather indoors, then, it would be fully warranted. Accordingly, the judgment below should be reversed.

I. THE GANG LOITERING ORDINANCE IS NOT IMPERMISSIBLY VAGUE.

In addressing respondents' attacks on the clarity of the gang loitering ordinance, we begin with the claim that it is impermissibly overbroad because it proscribes conduct protected by the First Amendment. We begin here because, as respondents themselves observe, whether a law "inhibit[s] the exercise of constitutionally protected rights" determines the degree of "clarity that the Constitution demands of a law." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). See Resp. Br. 11-12, 39 n.32. After we explain why the special rules governing laws that inhibit First Amendment rights are inapplicable here, we then explain why, whatever ambiguities there may be in the definition of "loitering," this ordinance is not "impermissibly vague in all of its applications." *Hoffman Estates*, 455 U.S. at 494.

A. The Gang Loitering Ordinance Is Not Overbroad.

To support their overbreadth claim, respondents assert that the gang loitering ordinance infringes First Amendment rights of speech, assembly, and association. Yet respondents make only the barest of arguments about speech and assembly. By its terms, of course, the ordinance proscribes only loitering in disobedience of a police order, and "loiter" is defined as "to remain in any one place with no apparent purpose." Pet. App. 61a. Thus, the ordinance proscribes no "speech" of any kind; it proscribes only remaining in place after being ordered to move on.[1] As for the right of assembly, as we explain in our opening brief, it embraces only collective advocacy and expression. See Pet. Br. 19-20. As the Court put it in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), the First Amendment protects groups that "are making some sort of collective point" (*id.* at 568), and persons "making some sort of collective point" will always, or nearly always, have an apparent purpose, and therefore will not be subject to dispersal under the gang loitering ordinance.

In fact, respondents' argument that this ordinance infringes rights of speech and assembly on its face consists of little more than a passing citation to two cases, *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), and *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). See Resp. Br. 53-54. But both of those cases involved laws

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[1] Even respondents do not claim that the First Amendment's protection for "freedom of speech" grants anyone the right to remain in any one place. In *Colten v. Kentucky*, 407 U.S. 104 (1972), which respondents attempt to dismiss as a case about an individual who attempted to distract a police officer from performing his duties (Resp. Br. 27-28), the Court in fact made clear that Colten had no constitutional right to disobey the officer's order to move on regardless whether he had spoken to or distracted the officer. See 407 U.S. at 109 (Colten "had no constitutional right to observe the issuance of a traffic ticket").

that forbade much more than loitering—indeed laws that reached those who assembled for constitutionally protected purposes.

As for the dicta in *Shuttlesworth* on which respondents rely, the ordinance considered in that case, "[l]iterally read," provided that "a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city." 382 U.S. at 90. Thus that ordinance reached picketing, demonstrations, and other overt advocacy activities. Because our ordinance is limited to conduct with "no apparent purpose," it does not reach anyone who is picketing, demonstrating, or otherwise making his intentions and beliefs apparent to others. As we explain in our opening brief, the possibility that a demonstration or similar collective effort at advocacy will not have an "apparent purpose" is not sufficient to brand this ordinance substantially overbroad (Pet. Br. 22-23); and neither respondents nor the courts below have even suggested that picketers or demonstrators fall within the definition of "loitering" found in the ordinance. To the contrary, respondents concede that "anyone will surely recognize a parade or formal demonstration for what it is . . . ." Resp. Br. 64.

As for *Coates*, that case invalidated an ordinance prohibiting conduct "annoying to persons passing by" (402 U.S. at 611), and therefore proscribed any demonstration or other advocacy activity that a passing police officer might find annoying. For that reason it "violate[d] the constitutional right of free assembly and association" (*id.* at 615), but such a holding affords no support for the extravagant notion that mere casual social interaction of the type in which loiterers typically engage is an "assembly" protected by the First Amendment. If that were the case, of course, the Court's holding that social gatherings at private clubs are not protected by the First Amendment in *New York State Club Association v. City of New York*, 487 U.S. 1 (1988), would have to be overruled, and the Court's rejection of the claim that "the Constitution recognizes a generalized right of 'social association' " in *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). would be flatly incorrect as well.

Beyond these passing references to speech and assembly, respondents rely exclusively on the ordinance's impact on associational rights to support their overbreadth claim. It is to that question that we turn next.

1. *The gang loitering ordinance does not infringe rights of association.*

Respondents make overbreadth arguments based on both types of associational rights that the First Amendment recognizes—the rights of "intimate" and "expressive" association. But standing with others in public while having no apparent purpose is neither intimate activity nor the kind of joint advocacy effort that qualifies for constitutional protection.

Respondents claim that a law directed at public loitering by groups including gang members infringes the right of "intimate" association because it will inhibit some family members' meetings in public. See Resp. Br. 57-59. But of course there is little that is "intimate" about public loitering. Those who loiter in public are on display not only to the public at large but, in particular, to the Chicago Police Department. Surely if an officer chose to stand next to loiterers in order to monitor their interactions, respondents could not claim that the officer would be infringing a right of intimate association. Cf. *United States v. Knotts*, 460 U.S. 276 (1983) (individuals have no legitimate expectation of privacy that can shield them from having their movements monitored while in public). Their claim can surely be no stronger because an officer orders them to move along instead of hovering nearby.

This Court has repeatedly rejected associational claims made by private clubs and associations that permit nonmembers to attend their functions, since gatherings in the presence of "strangers" cannot be "intimate." See *New York State Club Association*, 487 U.S. at 12; *Board of*

Directors v. Rotary Club, 481 U.S. 537, 567 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 621-22 (1984).[2] Those who loiter in public—where anyone else may lawfully approach and observe—surely have a far weaker claim to constitutional protection under the rubric of "intimate" association. Thus, because this ordinance reaches only public behavior, it infringes no right of "intimate association."

The claimed right of expressive association has no application here either. It is recognized when people join together "for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts*, 468 U.S. at 618. Thus, what we have said above, and in our opening brief, answers respondents' expressive association claim. This ordinance is not directed at speech—indeed it proscribes no speech—nor is it directed at assembly or any other First Amendment right, since constitutionally protected assemblies—as well as public prayer meetings and petitioning for redress of grievances—will nearly always have an "apparent purpose."

Respondents offer two responses to this submission. First, they claim that persons often use the public ways to engage in discussion of public events and other topics protected by the First Amendment. See Resp. Br. 61-62. But this ordinance, of course, addresses loitering in disobedience of a police order, not the discussion of any topic within the ambit of First Amendment protection. As we explain in our opening brief, the fact that two persons may

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[2] Respondents attempt to minimize the significance of the presence of strangers at supposedly "private" meetings to the results in these cases (Resp. Br. 58 & n.46), but in *New York State Club Association* the Court treated that fact as dispositive, concluding that the presence of nonmembers at the clubs "defin[ed] the nonprivate nature of these associations, because of the role strangers play in their ordinary existence, as is the regular participation of strangers at meetings, which we emphasized in *Roberts* and *Rotary*." 487 U.S. at 12.

be speaking to each other as they loiter does not grant otherwise proscribable conduct constitutional immunity from regulation. See Pet. Br. 19. For example, a law prohibiting obstructing the public ways is constitutional even when applied to persons who are demonstrating, since there is a legitimate basis to proscribe that conduct. See *Cameron v. Johnson*, 390 U.S. 611, 616-17 (1968); *Cox v. Louisiana*, 379 U.S. 559, 564 (1965). See also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973) (rejecting the claim that "a 'live' performance of a man and a woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue").

Indeed this Court's explication of the right of expressive association makes clear that it is not implicated merely because loiterers sometimes speak to each other. The Court has described this right as "the ability and the opportunity to combine with others to advance one's views" (*New York State Club Association*, 487 U.S. at 13), and as providing "protection to collective effort on behalf of shared goals" (*Roberts*, 468 U.S. at 622). The Court has made clear that the right of expressive association is infringed only when governmental action inhibits a group's ability to advocate its particular views on social and political questions. See *New York State Club Association*, 487 U.S. at 13-14; *Rotary Club*, 481 U.S. at 548-49; *Roberts*, 468 U.S. at 627-28. Plainly nothing remotely like that is present here. To the extent that street gangs and their associates wish to demonstrate, solicit contributions, or pass out literature promoting their favorite causes, they may do so with impunity, since these activities have an "apparent purpose." While the ordinance may be applied to disperse groups of loiterers who happen to be discussing public affairs, the weather, sports, or any other subject within the ambit of First Amendment protection, that does not mean that it infringes the right of expressive association. After all, the dance-hall ordinance sustained in *Stanglin* prevented those excluded from youth dances

from discussing these same subjects with those who could attend the dances, and the Court held that it infringed no First Amendment right.

Second, respondents claim that the ordinance reaches overt advocacy activity, such as "members of a community outreach group . . . attempting to persuade a gang member to leave his gang." Resp. Br. 59. The limitations on the ordinance's application to such activities, however, are plain from its text. Conduct falls within the ordinance's definition of "loiter" only when an individual's "purpose" for "remain[ing] in any one place" is not "apparent." When it is manifest to an observer why individuals are not moving along, then, those individuals are not subject to the ordinance. Thus when a group is holding protest signs outside of City Hall, or leafletting or soliciting passers-by at a particular location, its purpose is apparent, as we explain above. But when an officer can observe no more than that individuals are talking to each other, he cannot know why they have chosen to "remain in any one place" rather than stroll as they talk; hence their purpose for staying put is not "apparent." Thus it should be plain that most efforts by community advocates to counsel or proselytize gang members will not amount to loitering under this ordinance, just as any crowd that an officer observes listening to a speech would have an "apparent purpose"; indeed even the Illinois Supreme Court did not suggest that the ordinance reached such activities. Even so, there may be cases in which a counselor is sufficiently subtle in his methods that his purpose would not be apparent to a passing police officer. But as we explain in our opening brief, this type of hypothesizing does not make for substantial overbreadth. See Pet. Br. 22-23.

There is, of course, a wealth of experience under the gang loitering ordinance—as we explain in our opening brief, it was applied tens of thousands of times. Yet respondents cannot identify even a single instance in which it disrupted any advocacy activity. While respondents hypothesize that the ordinance reaches a "gulf of expressive opportunities" (Resp. Br. 64), it surely is not asking too much to expect them to provide even a single concrete instance of its application to protected activity, especially since the Court is properly "reluctant, in any event, to invalidate legislation 'on the basis of its hypothetical application to situations not before the Court.'" *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2177 (1998) (quoting *FCC v. Pacifica Foundation*, 438 U.S. 726, 743 (1978)). Nor does the legislative record lend substance to an overbreadth claim. The testimony before the City Council did not suggest that the neighborhoods in which this ordinance was to be applied were overrun with gang counselors and ministers—it was the intimidating presence of gangs that made for everyday reality in these neighborhoods, and those gangs, of course, were typically unaccompanied by counselors and ministers.

The most one can say about the impact of the gang loitering ordinance on associational activity is that, by granting the police authority to disperse groups containing gang members, it increases the legal risks confronting those who loiter with gang members. But as we have explained, this ordinance does not target constitutionally protected associational activity; hence the government is not constitutionally compelled to refrain from creating any burden or chill on this type of "association." And by discouraging loitering with gang members, the ordinance does not create "[g]uilt by association" as respondents claim (Resp. Br. 62); rather, it inhibits conduct that poses very real threats to health and safety—if nothing else, loitering with criminal street gang members increases the risk that those loitering will be shot by rival gangs, as the testimony before the City Council and the statistics that we have supplied to the Court show. Thus, if this ordinance inhibits conduct that all too often invites violence, directed both at gang members and those who happen to be near them, that is an inhibition for which we do not apologize.

2. *The gang loitering ordinance is a permissible regulation of loitering.*

We also explain in our opening brief that the gang loitering ordinance complies with the standards for permissible regulation of the time, place, or manner of speech, assembly, and association. See Pet. Br. 24-28. On this point, respondents first complain that the gang loitering ordinance is invalid because a permissible regulation must be "unconnected to association." Resp. Br. 66. But this is demonstrably incorrect—a regulation of the time, place, or manner of speech, assembly, or association is typically directed at just those activities. For example, the permit procedure upheld in the seminal case of *Cox v. New Hampshire*, 312 U.S. 569 (1941), targeted public meetings, parades, and other protected activities for special regulation. See *id.* at 571. The ordinance upheld in *Frisby v. Schultz*, 487 U.S. 474 (1988), similarly, was aimed at residential picketing. See *id.* at 476-77. Most pertinent for present purposes is *Roberts*, in which the Court imposed no requirement that regulation of associational activity be "unconnected to association." Rather, the Court held, "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." 468 U.S. at 623.

Next, respondents claim that the ordinance is not content-neutral because "[p]ersons subject to the ordinance are identified by their status as purported gang members." Resp. Br. 66. But the prohibition on content-based regulation does not extend to utilizing status as the basis for a regulation—as we have just explained, the requirement is instead that the regulation be "unrelated to the suppression of ideas." For example, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), involved a regulation directed at expressive activities—special zoning rules governing establishments offering sexually-oriented entertainment. The Court found those rules to be content

neutral because they were based on the effects that such establishments had on the surrounding neighborhood rather than the suppression of ideas or viewpoints. See *id.* at 46-50. Here, of course, the regulation at issue is not premised on the content of gang members' speech, but rather on the effect that gang loitering has on the community. Moreover, "no evidence has been . . . introduced to indicate whether the ordinance has been enforced in a discriminatory manner or with the aim of inhibiting unpopular speech." *Hoffman Estates*, 455 U.S. at 503.

Respondents also complain that the ordinance is not appropriately tailored because the City could utilize other laws to curb the harmful effects of gang loitering. See Resp. Br. 66-67.[3] What respondents ignore, however, is the City Council's findings on the utility of those other laws. In particular, as we explain in our opening brief, because gang members rarely break other laws in the presence of the police, it is frequently impossible to enforce those laws without relying on the testimony of the residents of gang-ridden areas—an unsatisfactory approach for many reasons. See Pet. Br. 3-4.[4] Indeed one thing that comes quite clear from the legislative record is the

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[3] On this point, respondents rely primarily on *DeJonge v. Oregon*, 299 U.S. 353 (1937), but the statute invalidated in that case was not content neutral; it criminalized advocacy of unlawful acts (see *id.* at 356-57) and had been applied to mere participation at a meeting of the Communist Party (see *id.* at 365-66).

[4] Amici Chicago Alliance for Neighborhood Safety, *et al.*, suggest that Chicago can avoid the problems of utilizing civilian witnesses by making arrests based on confidential tips. See CANS Br. 10-11. That approach is unsatisfactory for many reasons, not the least of which is that the absence of any witness willing to testify at trial will make it impossible to secure convictions, and no doubt lead to claims that these arrests are being used as an inappropriate method of summary punishment rather than to initiate bona fide prosecutions. In fact the City of Chicago is currently subject to a permanent injunction in *Nelson v. City of Chicago*, No. 83 C 1168 (N.D. Ill), stemming from its practice in the early 1980s of permitting police officers to make arrests when it did not intend to pursue prosecution of the arrestees.

widespread frustration with the enforcement of existing laws, largely because of the ability of gangs to obtain advance warning that the police are on the way and to cease selling narcotics and violating other laws once the police arrive. *E.g.*, Supp. R. I at 50-51, 68, 79-80, 138-40; Supp. R. II at 33, 38.

The testimony before the City Council also established that gang loitering has destructive effects regardless of whether gang members are breaking other laws within view of law-abiding witnesses as they loiter. For example, the testimony showed that when groups known to be gang affiliated loiter in commercial areas, law-abiding persons are frequently afraid to patronize nearby businesses, understanding as they do that gang members rarely like law-abiding persons in their immediate vicinity; as a result business activity is depressed in these areas and investment in them discouraged. *E.g.*, Supp. R. I at 59-60, 63-65, 75, 87, 97-98, 104, 112; Supp. R. II at 124-25, 171. To revitalize these areas, then, an anti-loitering ordinance is not only a more straightforward approach than attempting to assemble criminal cases against loiterers under other laws, but it also signals to law-abiding residents in a far more direct way that the authorities are able to make an impact on the streetscape.[5]

Finally, respondents claim that the ordinance does not leave open ample alternative channels for association, although they rely on a proposition plainly inapplicable here: "When expression and association are banned in specific locations other than quintessential public forums, the public streets are often the only alternative." Resp. Br. 67. Here, of course, the ordinance has no effect on associational activity indoors, and hence the public ways are not the only alternative available. Even the public ways remain available to gang members and those who

[5] In addition to the authorities we cite in our opening brief on this point (Pet. Br. 15-16), see Dan N. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 Geo. L.J. 1153, 1163-65 (1998).

wish to meet with them as long as they move on when directed to do so. Areas not designated for ordinance enforcement under General Order 92-4 remain available as well. On this last point, respondents complain that the Chicago Police Department did not announce which areas it had designated under the Order (Resp. Br. 24-25), but of course that does not change the fact that under the General Order, loiterers were left undisturbed in many parts of Chicago.[6]

B. The Gang Loitering Ordinance Contains Appropriate Standards For Its Enforcement.

Although respondents barely acknowledge the point, it is well settled that absent First Amendment overbreadth, a law can be struck down on its face only if it is invalid in all its applications. *E.g.*, *Reno v. Flores*, 507 U.S. 292, 300-01 (1993); *United States v. Salerno*, 481 U.S. 739, 745 (1987). We now explain why respondents' facial challenge does not satisfy this demanding standard.

1. *The ordinance provides fair notice of what it prohibits.*

On the first prong of vagueness inquiry, whether a challenged law "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited" (*Kolender v. Lawson*, 461 U.S. 352, 357 (1983)), respondents contend that persons cannot know "whether they are at all times adequately manifesting to others their purpose for being present in public." Resp. Br. 19. Whatever ambiguity lies in the definition of "loitering," however, it is plainly not vague in all, or even most, of its applications, as even the Illinois Supreme Court acknowledged. See Pet. App. 9a (finding "a common and accepted meaning of the word 'loiter' ").[7]

[6] Respondents also suggest that too many areas were designated (Resp. Br. 25), but of course resolution of this claim must await development of an appropriate record, should respondents choose to pursue a challenge to the ordinance as applied.

[7] We are puzzled by respondents' claim that the Illinois Supreme Court's failure to adopt a "limiting construction" of the ordinance

There are in fact at least two large classes of cases in which the application of the ordinance will be crystal clear. On one hand, as we explain above, in many cases police officers will readily discern why individuals—ranging from pickets to those standing at marked bus stops—are staying in any one place, and hence will know that such persons are not loitering. On the other hand, there will also be many instances in which individuals will know that their conduct provides observers with no apparent indication of why they are staying in one place—especially when it is gang members that are loitering. As we explain above, the testimony before the City Council made clear that gang members and their hangers-on frequently occupy the public ways in order to sell narcotics or break other laws, but when the police arrive they instead appear to be innocently loitering. Such persons surely know that they have no "apparent purpose"; to the contrary, their "purpose" is to prevent the police from learning why they are on the public ways. And because respondents do not even attempt to show that the ordinance is vague in either of these circumstances, they cannot hope to prevail under a test that requires them to demonstrate that the ordinance is invalid in all its applications.[8]

(Resp. Br. 20 n.13) has some significance for this case. The court acknowledged that the term "loiter" has a common meaning; its holding was instead premised on its view that an order to loiterers to move on fails to provide sufficient notice under this Court's dicta in *Shuttlesworth*. See Pet. App. 12a-14a. As we explain below, that was error. And in any event, even respondents do not contend that the decision below rests on an adequate and independent state-law determination that the ordinance has no ascertainable meaning. As we explain in our opening brief, a state-law basis for decision is present when a state court's opinion contains an express statement that its decision rests on state law, and no such statement can be found in the decision below. See Pet. Br. 1-2 n.1.

[8] Respondents suggest that the lower courts have uniformly invalidated loitering laws for lack of fair notice (Resp. Br. 18-19), but in fact the lower courts have been sharply divided. See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 Colum. L. Rev. 551, 608-34 (1997).

In any event, we acknowledge that there will be instances in which individuals will not realize that their purpose for staying put is not apparent to others (or will not know that they are loitering with a gang member). When that is the case, however, the requisite notice is still provided: it comes from the order to disperse that the ordinance requires before an arrest can be made. Indeed even respondents concede that "persons will know what they need to do to avoid arrest under the ordinance —*i.e.*, obey the order." Resp. Br. 26.

Because this law proscribes only knowing disobedience to a police order, it does not "trap the innocent." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). And there is no prohibition on the use of police directives to notify persons of what the law forbids; in *Cox v. Louisiana*, for example, the Court upheld a statute prohibiting demonstrations "near" a courthouse because demonstrators could rely on the police to tell them "how near the courthouse a particular demonstration can be . . . ." 379 U.S. at 568. Thus respondents' argument that "[a] law that prohibits remaining in a place without an 'apparent purpose' is so amorphous that it provides no standard at all" (Resp. Br. 18) is not even properly directed at the gang loitering ordinance. The ordinance does not prohibit loitering; it prohibits disobedience to a police order to move along. That is hardly an "amorphous" offense.

The claim that the police cannot determine who is "loitering" goes, at best, to the question whether the ordinance contains standards for its enforcement, not to the question of fair notice. Under this ordinance, the order to disperse gives notice in the same way that "no parking" signs give the public notice of where parking is forbidden—notice that is quite clear even if the public is unaware of the standards that the authorities use to decide where to forbid parking. And this type of notice —notice of what the law forbids—is the only type of notice the Constitution requires. See, *e.g.*, *United States v. Lanier*, 117 S. Ct. 1219, 1225 (1997) (due process

requires that no one "shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed") (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964), and *United States v. Harriss*, 347 U.S. 612, 617 (1954)); *Kolender*, 461 U.S. at 357 (due process requires that "a penal statute define a criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited"); *Grayned*, 408 U.S. at 108 ("we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly"); *Colten v. Kentucky*, 407 U.S. 104, 110 (1972) (due process requires "fair warning that certain kinds of conduct are prohibited"). Under this ordinance, of course, it is not illegal to loiter; the ordinance proscribes loitering only after receipt of a police order to move along. Thus due process requires no warning that "loitering" is illegal in Chicago—because it is not. Due process requires only fair notice of what conduct violates the law. The police order to disperse provides that notice.

For this reason, respondents' complaint that our submission is "an end-run around this principle of fair warning" because it permits a person to "be told to disperse before being arrested and prosecuted for underlying conduct that itself is insufficiently defined" (Resp. Br. 26), misses the mark. The only "conduct" for which one can be "arrested and prosecuted" under this ordinance is disobedience to a police order, and by telling individuals that they must disperse, the order provides the fair notice the Constitution requires. As we have explained, the Constitution requires notice only of the conduct for which one can be "arrested and prosecuted," not notice of every circumstance that might authorize the police to issue orders to those they encounter in public. Nor does it aid respondents to claim that people should know "what they need to do . . . to avoid being dispersed from public places." Resp. Br. 27. The Constitution in fact secures no right "to avoid being dispersed" when one has no apparent purpose. As we explain in our opening brief and reiterate here, neither the First Amendment, substantive due process, nor any other principle of constitutional law secures a right to loiter. Thus when people are told to move along, they are deprived of no constitutional entitlement.

Of the authorities on which respondents rely, only two cases involved laws that required disobedience to a police order before an arrest could be made.[9] The first is *Shuttlesworth*, but the dicta on which respondents rely, as we explain in our opening brief and reiterate above, says only that a law enabling the police to order anyone standing in the public ways to move on would permit suppression of First Amendment activity and arbitrary and discriminatory enforcement. This dicta says nothing remotely helpful to respondents on the issue of fair notice. A law requiring persons to obey all police orders may have many defects—including those identified in the *Shuttlesworth* dicta—but a failure to give persons notice of what they are expected to do is not among them. The other case that respondents cite is *Wright v. Georgia*, 373 U.S. 284 (1963), but again the constitutional infirmity identified in that case had nothing to do with a lack of fair notice. The order to leave a public park at issue in *Wright* was given "to enforce racial discrimination in the park. For this reason the order violated the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 292. And, of course, when a law authorizes the police to enforce racial segregation it fails to observe "the boundary between constitutionally permissible and constitutionally impermissible applications of the statute." *Ibid.*

Some of respondents' amici claim that the dispersal order is unclear because it does not delineate precisely

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[9] Of the other cases on which respondents rely, *Thornhill v. Alabama*, 310 U.S. 88 (1940), considered a statute prohibiting loitering near a business in order to discourage others from patronizing it (*id.* at 91-92); *Palmer v. City of Euclid*, 402 U.S. 544 (1971), involved a law applicable to anyone found in public at night (*id.* at 544); and, as we explain in our opening brief, *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), also involved a law that could reach anyone found outdoors at night (see Pet. Br. 31).

how far loiterers must go in order to "disperse and remove themselves from the area." See NBPA Br. 13-14; CANS Br. 20-25. But of course the Constitution does not require laws to be worded with "mathematical certainty" (*Grayned*, 408 U.S. at 110); laws need only utilize "terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 579 (1973). Here, of course, persons using common sense can understand what an order to "disperse and remove [your]selves from the area" means—if they remain in proximity to each other and have traveled no meaningful distance, they have plainly not complied with the order, and surely cannot claim surprise if they are arrested. In *Cox v. Louisiana*, for example, the Court upheld a statute prohibiting demonstrations "near" a courthouse against vagueness attack, reasoning that it was not vague "at least as applied to a demonstration within the sight and hearing of those in the courthouse." 379 U.S. at 568. Here, as well, anyone who remains within sight and hearing of those at the location from which he was ordered to leave surely cannot complain of vagueness. Indeed amici offer not even a single instance from the tens of thousands of cases brought under the ordinance in which an individual moved on for any appreciable distance yet still was arrested. And no respondent—including those whose cases were tried—ever claimed that he was confused about how to comply with an order to disperse.[10] An order to "disperse and remove [your]-

[10] Amici speculate that persons must be confused about how to comply with the ordinance because of the large number of arrests made. See CANS Br. 22. The large number of arrests is more likely a consequence of the tenacity with which gang members remain in lucrative locations on the public ways in order to sell narcotics and intimidate potential rivals, since occupying such locations is central to the revenues that gangs derive from the drug trade. See generally *e.g.*, Jeffrey Fagan, *Gangs, Drugs, and Neighborhood Change*, in *Gangs in America* 49-73 (C. Ronald Huff ed. 1996); Wesley G. Skogan, *Disorder and Decline* 29-32 (1990); Irving A. Spergel, *The Youth Gang Problem: A Community Approach* 43-54 (1995).

selves from the area" uses "words of common understanding" (*Boos v. Barry*, 485 U.S. 312, 332 (1985)); hence it provides fair notice.[11]

The decided cases illustrate our point—as long as the person receiving an order, by exercising a modicum of common sense, can understand what is required of him, that order should be sustained. The police order to move on upheld in *Colten*, for example, did not contain precise geographical guidance, but of course Colten could have discerned that he should have moved far enough so that he was no longer near the officer who was writing a traffic ticket. See 407 U.S. at 110. Similarly, in the companion case of *Cox v. Louisiana*, 379 U.S. 536 (1965), the Court found no infirmity in a breach of the peace provision criminalizing "a refusal to move on after being ordered to do so," characterizing it as "narrow and specific." *Id.* at 551. In fact, if the Constitution required people to be given specific guidance about how far they must go in order to "disperse" or "move on," the dispersal statute upheld in *Boos* should have been struck down, and none of the dispersal laws inventoried by amici Ohio, *et al.*, could survive.[12]

[11] This same point answers amici's related contention that the ordinance's application to persons loitering "with" gang members (Pet. App. 61a) is impermissibly vague. See NBPA Br. 11-12. Certainly persons commonly understand what it means to be "with" someone else. And, in any event, even if one is unsure about whether he is loitering "with" gang members, he still need not fear arrest unless he disobeys a police order to move on.

[12] If amici mean to argue that due process requires laws to establish geographical boundaries in which specified conduct is prohibited, that argument was rejected in *United States v. Mazurie*, 419 U.S. 544 (1975). In that case, the Court upheld a statute prohibiting unlicensed liquor sales in "Indian country," excluding from that definition areas within reservations containing "non-Indian communities." *Id.* at 547. The Court rejected the claim that due process required the statute to utilize "a geographical area with precise boundaries" (*id.* at 552), concluding that persons could

Respondents also attack the sufficiency of the dispersal order to supply fair notice, claiming that persons have no prior notice that dispersal is "authorized under the ordinance" (Resp. Br. 26) and adding that "a person has a right to adequate notice so that he may determine whether the officer is misapplying a law" (*id.* at 27). But there is no support for respondents' novel theory that persons have a right to some sort of prior notice so that they can decide for themselves if the police are authorized to issue an enforceable order. As we explain above, the requirement of fair notice entitles people to notice of what the law forbids; it contains nothing like a requirement that people receive some type of advance warning that the police have determined that they are authorized to issue an enforceable order. In *Boos v. Barry*, for example, the Court upheld an ordinance that permitted police to order any group within 500 feet of a foreign embassy to disperse if they reasonably believe that normal embassy activities have been or are about to be disrupted, even though the ordinance did not identify "the prohibited quantum of disturbance," much less require the police to warn demonstrators that they had reached that "quantum." See 485 U.S. at 331-32. Similarly, *Cox v. Louisiana*, as we explain above, upheld a statute prohibiting demonstrations "near" a courthouse, and, far from condemning "administrative discretion to construe the term 'near,'" made clear that demonstrators should "rely on [the police's] administrative interpretation of how 'near' the courthouse a particular demonstration might take place . . . ." 379 U.S. at 569.

The police order itself provides notice that the officer issuing it has determined that he is authorized to disperse loiterers; thus the only conceivable purpose for providing persons with advance notice that a police officer believes that they are loitering in a group with gang members

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reasonably understand the statutory phrase by reference to the racial identity of those within the general vicinity of an establishment. See *id.* at 552-53.

would be to permit them to dispute that point with the officer, and the place for such disputes is the courtroom, not the street. Moreover, if the police must give persons an opportunity to debate them before they may issue an enforceable order to disperse, the police would presumably be required as well to evaluate loiterers' explanations for their conduct, thereby making precisely the sort of inherently subjective credibility determinations about individuals' purpose and intent that the Court condemned in *Kolender*. See 461 U.S. at 358-60. Such an approach would also be inconsistent with this Court's Fourth Amendment jurisprudence, which, as we explain in our opening brief, permits officers to detain or arrest individuals based on their reasonable beliefs (Pet. Br. 36-37), without first requiring them to give individuals some type of opportunity to "determine whether the officer is misapplying a law" (Resp. Br. 27).

We explain in Part I.B.2 below that the ordinance supplies the police with sufficient standards governing their authority to issue orders to move on. That being the case, the requirement of fair notice does not obligate the police to provide loiterers with any type of prior notice of their determination that those standards have been satisfied. As long as persons are given reason to understand that if they fail to move along they court arrest, they have "fair warning that certain kinds of conduct are prohibited." *Colten*, 407 U.S. at 110. And because it is clear that the police order to disperse gives people notice of what they are expected to do, it becomes plain that respondents' real objection to this ordinance is not to its vagueness, but its scope—they complain that people will be ordered to move along even when they are engaged in "everyday, innocent behavior." Resp. Br. 19. That is an objection to the rationality of the ordinance, not its clarity, and we address it in Part II below. When it comes to vagueness, however, there is no substance to respondents' complaints; an ordinance that requires disobedience of a police order before an arrest can be made is plainly no trap for the unwary.

2. *The ordinance does not authorize arbitrary or discriminatory enforcement.*

On the second and "more important aspect of vagueness doctrine" (*Kolender*, 461 U.S. at 358), respondents confine themselves to the single claim that there are no "guidelines whatsoever for" determining when individuals are loitering. Resp. Br. 30. But the concept of "remain[ing] in any one place with no apparent purpose" (Pet. App. 61a) surely is not wholly subjective and indeterminate—indeed as we point out above, even the Illinois Supreme Court acknowledged a "common and accepted meaning" of the term "loitering."

At a minimum, of course, the ordinance grants the police no discretion to enforce it against people who are moving along, or who obey dispersal orders. And even among those who do remain in any one place, the concept of "no apparent purpose" has meaningful content. As we explain above, gang members who pretend to be innocently loitering when the arrival of the police disrupts their criminal activities surely have "no apparent purpose" —in fact they are doing all they can to ensure that their "purpose" is not "apparent" to the police. That there will be close cases—such as the occasional gang counselor whose purpose is not apparent—does not establish that this definition is "impermissibly vague in all of its applications." *Hoffman Estates*, 455 U.S. at 497.[13] A law is not invalid on its face merely because "doubts as to the applicability of the language in marginal fact situations may be conceived . . . ." *United States v. Powell*, 423 U.S. 87, 93 (1975).

But we need not rely on the ordinance's definition of "loiter" to explain why it contains a principled basis for enforcement. That is because the ordinance permits en-

[13] The examples cited by the Illinois Supreme Court (Pet. App. 10a) and endorsed by respondents (Resp. Br. 20) in fact illustrate this point—persons hailing passing taxis, panting joggers gasping for breath, and pedestrians huddled at a doorway taking shelter from a storm plainly have an apparent purpose for staying put.

forcement only when an officer observes that a group of loiterers contains "a person whom he reasonably believes to be a criminal street gang member." Pet. App. 61a. Respondents do not even attempt a claim that the police determinations of gang membership are inherently subjective; nor did the Illinois Supreme Court embrace such a conclusion. We explain in our opening brief that gang membership can be objectively ascertained (Pet. Br. 35-36), and as the record in the cases of the respondents who were convicted at trial make clear, there are a variety of ready and quite objective means of determining gang membership available to Chicago police officers, including merely asking loiterers about their affiliations, which gang members appear to be all too willing to trumpet.[14]

Instead of attacking as vague the requirement that the police reasonably believe that a group of loiterers contains a gang member, respondents merely echo the Illinois Supreme Court's position that this "does absolutely nothing to cure the imprecisions of the definition of the 'loitering' element of the crime." Resp. Br. 31 (quoting Pet. App. 16a). Of course, if it were the case that the use of "loitering" as an element of an offense were sufficient to doom a law regardless of the limitations on enforcement discretion imposed by the other elements of the offense, all loitering laws would be invalid. Yet in

[14] The closest respondents come to complaining about this aspect of the ordinance is to suggest that the evidence at the trial of respondent Morales indicates that the police make arrests even in the absence of evidence that a group of loiterers contains a gang member. See Resp. Br. 31-32 n.25. This claim, of course, does not attack the ordinance on its face, and its resolution must await an appropriate record. If the arresting officer in that case lacked a reasonable basis for his belief that gang members were loitering, of course, that would not establish the ordinance's vagueness, but only that Morales' conviction should be reversed for insufficient evidence of one of the elements of the offense. For his part, Morales has not even made such a claim. And in any event, the record in Morales' case lends scant support to respondents' theory, since Morales admitted in his own testimony that he knew he was with criminal street gang members. See Morales Tr. 19, 22.

Kolender, the Court made clear that a loitering law authorizing detention on reasonable suspicion under the standard of *Terry v. Ohio*, 392 U.S. 1 (1968), would be valid because that standard provides "neutral limitations on the conduct of individual officers." 461 U.S. at 361 (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)). Thus the other elements found in a loitering law are plainly important—the use of loitering as one element of an offense is not alone sufficient to condemn a law on grounds of vagueness.[15]

In fact it is well settled that the vagueness of some elements can be cured by limitations on enforcement discretion contained in others. In *Hoffman Estates*, for example, it was a scienter requirement that saved a provision criminalizing the sale of items "marketed for use" with illegal drugs. See 455 U.S. at 502. See also *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 526 (1994) (federal drug paraphernalia statute's scienter requirement "assists in avoiding any vagueness problem"). Similarly, in *Grayned*, the Court sustained the anti-noise ordinance at issue because one of its elements limited its reach to noise that disrupts normal school activities. See *id.* at 110-11. See also *Boos*, 485 U.S. at 331-32 (upholding ordinance restricting demonstrations near embassies because one required element was a reasonable belief that the activity would disrupt the embassy). Indeed, we suspect that a whole host of laws—such as prohibitions on disturbing the peace or creating a nuisance—would be impermissibly vague if only their broadest elements were considered in isolation.

Thus, respondents' claim that the gang loitering "ordinance provides no standards by which a police officer can determine what conduct it prohibits" (Resp. Br. 29-30) is insupportable. Not only does the ordinance grant no authority over those who are moving along, who have

[15] Indeed even respondents suggest that some laws employing loitering as an element of an offense are valid, although they hedge considerably on this point. See Resp. Br. 12 & n.5, 19 n.12, 22 n.16.

an apparent purpose, or who obey orders to disperse, but it can be used only when an officer has an objectively reasonable basis to identify a loiterer as a gang member. Targeting an anti-loitering law at such groups thus does not "permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). Rather, enforcement is undertaken under this ordinance against only those groups that the City Council found were most likely, if permitted to loiter with impunity, to commit crimes, invite violence from other gangs, intimidate law-abiding persons, and drive down property values. The judgment that these groups warrant a targeted anti-loitering effort, coupled with the requirement that arrests occur only when a police order is disobeyed, means that the "City Council has made the basic policy choices, and has given fair warning as to what is prohibited." *Grayned*, 408 U.S. at 114. The ordinance is not, therefore, impermissibly vague.

II. THE GANG LOITERING ORDINANCE DOES NOT OFFEND SUBSTANTIVE DUE PROCESS.

Going well beyond the holding of the Illinois Supreme Court, respondents assert that our Constitution recognizes a fundamental right to stand still, which they anchor in either the Eighth Amendment or in the unenumerated rights protected by substantive due process. Respondents' theory would presumably require strict judicial scrutiny of every loitering law in the country. That theory should not find favor in this Court.

A. The Gang Loitering Ordinance Appropriately Advances Legitimate Governmental Interests.

Respondents argue that the gang loitering ordinance triggers strict judicial scrutiny because it infringes a "fundamental right of free movement in public places and forums." Resp. Br. 33 (footnote omitted). Not only is this claimed right inconsistent with the decisions of this Court, such as *Stanglin* and *Colten*, upholding the au-

thority of the government to regulate where individuals are permitted to be, but it also reflects a serious misreading of this Court's cases involving fundamental constitutional rights. To be sure, we do not doubt that the gang loitering ordinance affects a liberty interest within the ambit of the Due Process Clause. As the Court observed in *Kolender*, a loitering law, by granting regulatory power over those standing on the public ways, "implicates consideration of the constitutional right to freedom of movement." 461 U.S. at 358. But that is very different from saying that there is a fundamental right to loiter requiring strict scrutiny of every loitering law. And when a challenged enactment implicates a constitutionally protected liberty interest, but impinges on no fundamental right, it should be upheld as long as it is rationally related to a legitimate government interest. *E.g., Washington v. Glucksberg*, 117 S. Ct. 2258, 2271-72 (1997).

This Court has never proclaimed a fundamental right of "free movement." Rather, it has read the line of cases on which respondents rely to recognize as fundamental the "right of interstate travel." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254 (1974). This "constitutional right to travel, or more precisely, the right of free interstate migration" (*Attorney General v. Soto-Lopez*, 476 U.S. 898, 902 (1986)), is plainly inapplicable here—loitering is in no sense interstate travel. Nor does the Court's right-to-travel jurisprudence suggest that there is a sound basis to extend this right to loiterers. The Court has explained that the right to travel is fundamental because the nature of the union achieved by our Constitution presupposes that the residents of each State have a right to pass through or move to any other. See, *e.g., Soto-Lopez*, 476 U.S. at 901-03; *United States v. Guest*, 383 U.S. 745, 757-59 (1966). But the right to pass through or take up residence in another State in no way suggests a right to loiter once one arrives.

In fact, the right of travel the Court has recognized is not infringed by "a purely intrastate restriction" on movement within a jurisdiction, even if the restriction

happens to be applied "against travelers from other States." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 277 (1993).[16] And even if wholly intrastate travel were constitutionally protected, loiterers, of course, are not "traveling" at all.[17] This doubtless explains why the historical record of respecting the right to travel correctly identified by respondents (see Resp. Br. 34-38) coexists with an equally substantial historical record of regulating loitering (see Pet. Br. 41; WLF Br. 12-20). History thus makes clear that the right to travel has never been thought to extend to loitering. At best, as we explain in our opening brief, loitering is an "amenity of life," but legislatures frequently must regulate the common amenities of life when the liberty interests of different constituencies come into conflict. See Pet. Br. 42-43.

Respondents' only attempt to explain why the right to travel reaches loiterers—who are subject to this ordinance only when they refuse to "travel" in response to a police order—is to observe that the Court has understood the First Amendment to include a right not to speak or associate. See Resp. Br. 35 n.28. But this First Amendment principle has no application here. The First Amendment's protection for "freedom of speech" necessarily includes

[16] Respondents claim that *Kent v. Dulles*, 357 U.S. 116 (1958), and *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), somehow held that wholly intrastate enactments such as anti-loitering laws implicate fundamental rights. Yet even respondents acknowledge that these cases involved foreign and not intrastate travel. See Resp. Br. 38-39. And in any event, this Court has not read *Kent* and *Aptheker* to recognize any fundamental right; the Court has since held that Congress has plenary power to restrict travel abroad as long as restrictions are not based on the political beliefs or affiliations of those seeking to travel. See, *e.g., Regan v. Wald*, 468 U.S. 222, 240-42 (1984); *Zemel v. Rusk*, 381 U.S. 1, 13-17 (1965).

[17] To support their request for strict judicial scrutiny, respondents rely on cases in which challenged enactments authorized the government to institutionalize or imprison individuals. See Resp. Br. 49 n.42. But unlike the right to stand in one place, the right not to be taken into custody absent conviction of a crime is fundamental. See, *e.g., Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Salerno*, 481 U.S. at 750.

protection from governmental coercion that forces one to speak: "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley*, 515 U.S. at 573 (quoting *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 16 (1986) (plurality opinion)). No comparable constitutional value is served by loitering —it does not bind the states together as does interstate travel, nor does it advance any other fundamental constitutional value to which state or local governments cannot be expected to be sensitive. And when that is the case, "[t]here is no reason to think the democratic process will not strike the proper balance . . . ." *Glucksberg*, 117 S. Ct. at 2303 (O'Connor, J., concurring).

Respondents cannot explain why the Court upheld restrictions on the allegedly fundamental right of "free movement" in *Stanglin* and *Colten*, among other cases, without identifying any fundamental constitutional right; and so they eventually concede that even in their view a fundamental right is implicated only "where a restriction imposes some nontrivial burden on movement." Resp. Br. 41. Yet even if that were the test, respondents do not explain why this ordinance imposes an impermissible burden on "movement"—gang members remain free to loiter alone, or in groups as long as they move along when asked to do so, or when they are in areas not designated for ordinance enforcement, and they can walk anywhere they please, alone or in groups. Given the weighty justifications for this ordinance, the modest burden it imposes is hardly impermissible. After all, the Constitution prohibits only undue or unwarranted restrictions on even fundamental rights. *E.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 875-79 (1992) (opinion of O'Connor, Kennedy & Souter, JJ.) (only undue or unwarranted burdens on the right to abortion are impermissible); *Sosna v. Iowa*, 419 U.S. 393 (1975) (one-year residency requirement to obtain a divorce was sufficiently justified and did not impermissibly infringe the right to travel).

Respondents also suggest that the right to loiter is "implicit in the concept of ordered liberty." Resp. Br. 40, 42. The testimony before the City Council, as well as its findings, belies that claim. Neighborhoods where law-abiding persons feel imprisoned in their own homes and frustrated with the inability of the government to solve that problem cannot enjoy the fruits of "ordered liberty." Indeed this ordinance is justified in large part as an effort to secure the right of law-abiding persons to "free movement" in their own communities.

As we explain in our opening brief (Pet. Br. 14-17, 41-42), recognition of a substantive due process right to loiter would inappropriately circumscribe potentially valuable anticrime measures. On this point, respondents attempt to dismiss the statistics contained in the report we have lodged with the Court. First, they observe that gang crime increased in 1993 and 1994 (Resp. Br. 46), but they forget that the ordinance was implemented only gradually, as officers were trained in this new tool and areas of Chicago were slowly designated for ordinance enforcement. In fact, more than half of all gang loitering arrests occurred in 1995, the final year of enforcement, and in that year dramatic declines in gang crime occurred. But in 1996, not only did gang-related homicide rise while the overall homicide rate fell, but the same pattern was observed for aggravated battery with a firearm; and the spectacular 1995 decline in drive-by shootings was largely halted. Respondents also observe that gang-related homicide dropped in 1997 (*ibid.*), but that was in comparison to the increase in gang-related homicide in 1996 that accompanied the end of gang loitering enforcement. Moreover, gang-related shootings and drive-by shootings both rose in 1997, indicating that the dip in gang homicide was more a factor of poor marksmanship than fewer shots fired. Even more distressing, during the first eight months of 1998, gang-related homicides and aggravated battery with a firearm again rose more rapidly than the general

rate for those crimes, and drive-by shootings rose as well.[18] Thus, while respondents believe that enforcement of other laws can stem the tide of gang crime, the statistics do not bear them out.

Of course, respondents are correct that determining the cause of the impressive decline in gang crime in 1995 is perilous business. Our point is not to express certitude about the import of the statistics, but rather to make clear that the holding respondents seek would end experimentation with a potentially valuable tool.[19]

To explain why the ordinance is irrational, respondents confine themselves to three claims. First, they complain that orders to disperse under the ordinance can be directed at anyone loitering with gang members, even those not in a gang. See Resp. Br. 44-45. But of course non-gang members are at risk when they loiter with gang members, whose very presence in public is often an invitation to violence. And non-gang members are also frequently at risk of being recruited by the gang. Thus the City Council had every reason to wish to discourage this type of association. Moreover, the difficulties attendant to sorting through a crowd and attempting to explain who must

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[18] We are advised by the Chicago Police Department that during the first eight months of 1998, gang-related homicides rose 1.6%, while the overall homicide rate fell 4.0%; gang-related aggravated battery with a firearm rose 32.4%, while the total for aggravated battery with a firearm rose only 4.4%; and drive-by shootings rose 40.4%.

[19] Although some of respondents' amici claim that the ordinance was opposed by many African-Americans (CANS Br. 4-5), even they do not dispute that its support in the minority community increased after the ordinance's results became clear. As amici Chicago Neighborhood Organizations explain, while the ordinance had substantial African-American support at its enactment, that support has increased over time, as reflected in the City Council's resolution urging this Court to sustain the ordinance enacted earlier this year, and in the petition drive in support of the ordinance that has enjoyed particular success in the minority community. See CNO Br. 14-18.

leave and who may stay if orders to disperse were directed only to gang members would be considerable. In any event, at most this is a claim that the ordinance is over-inclusive, but "narrow tailoring is required only when fundamental rights are involved." *Reno v. Flores*, 507 U.S. at 305.

Second, respondents complain that the ordinance does not require an individualized assessment of the potential dangerousness of each group of loiterers. See Resp. Br. 49-50. Of course, such assessments would be rife with subjectivity and hence give rise to the risk of arbitrary and discriminatory enforcement condemned in *Kolender*. Moreover, under the rational basis test, the government may use classifications in its legislation; given the difficulties of making individualized determinations, a failure to require them does not render a law irrational. *E.g.*, *Reno v. Flores*, 507 U.S. at 303-05. The cost attendant to any prophylactic law, including this one, is that it will sometimes reach situations in which the conduct at issue is harmless or even productive; but even respondents do not deny that substantive due process permits the legislature to strike the balance between the costs and benefits of prophylactic rules, at least when no fundamental constitutional right is at stake. See Pet. Br. 43-44. Here, the legislative decision to strike the balance as it did was eminently reasonable, especially since the consequence of permitting the police to order people whose conduct may in fact be innocuous to move along is no more than a minor inconvenience to those persons, while the consequence for a community when gang loitering invites violence, facilitates criminal activity, and instills fear and hopelessness in law-abiding people, is far more serious.

Finally, respondents renew their contention that Chicago should rely on other laws to address the effects of gang loitering. See Resp. Br. 50-52. But as we explain above, respondents ignore the City Council's findings about the utility of those other laws. Respondents and their amici no doubt sincerely believe that the problems associated

with gang crime can be adequately addressed by other measures, but the elected representatives of the people of Chicago have concluded otherwise, and in a constitutional framework that entrusts policy judgments to the people's elected representatives, the City Council's view is the one that should control.[20]

B. The Gang Loitering Ordinance Does Not Create A Status Offense.

Respondents contend that the gang loitering ordinance creates a status offense because it "lacks an *actus reus*." Resp. Br. 68. There are, however, significant deficiencies in respondents' analysis of the two types of conduct that the ordinance requires.

Respondents argue that loitering cannot qualify as an act independent of the actor's status because it involves "reflexive, everyday conduct" that is "unavoidable." Resp. Br. 69. But while standing still at some point in one's day may be unavoidable, respondents do not explain why anyone is compelled to loiter in public with criminal street gang members. Choosing to join or loiter with a gang is hardly "reflexive" conduct. And in any event, the ordinance also requires disobedience to a police order as an element of the offense it creates. That is plainly a voluntary act and not a status or condition.[21] Respond-

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[20] Respondents attempt to use the testimony of former Deputy Superintendent of Police Gerald Cooper to support their view that this ordinance is unnecessary (Resp. Br. 51-52). All Deputy Cooper said, however, was that many other laws exist that address gang crime; he did not come close to endorsing respondents' view that this law is unnecessary. In fact, he supported the law's enactment. See Supp. R. II at 175-78, 185-86. And in any event, surely the totality of the testimony before the City Council about whether existing laws addressed the problems attendant to criminal street gangs satisfactorily, as well as the findings of the City Council on that point, should control over one snippet from Deputy Cooper's testimony.

[21] On this point, respondents merely repeat their citation to *Wright v. Georgia*. See Resp. Br. 70. But that case, as we explain above, held only that a police order given to enforce racial segregation in a public park was unconstitutional by virtue of the Equal Protection Clause.

ents wholly fail to explain why an ordinance requiring disobedience to a police order amounts to "[c]riminalization of status alone." *Id.* at 68.

Indeed respondents make essentially the same argument that the Court rejected in *Powell v. Texas*, 392 U.S. 514 (1968). Powell had argued that alcoholics could not avoid public intoxication, making it a forbidden status offense, but the Court observed that while alcoholics may be compelled to drink, they need not do so in public. See *id.* at 532 (plurality opinion); *id.* at 551-54 (White, J., concurring in the result). Here as well, loitering in public in disobedience of a police order, especially in the face of legislative findings about the evils that accompany gang loitering, can properly be proscribed.

III. THE GANG LOITERING ORDINANCE DOES NOT OFFEND THE FOURTH AMENDMENT.

We explain in our opening brief that orders to move on given under the gang loitering ordinance do not violate the Fourth Amendment, both because they do not involve "seizures" within the meaning of that amendment, and because, given their minimal intrusiveness and the law enforcement interests underlying them, they are constitutionally reasonable. See Pet. Br. 47-48. Respondents, for their part, have abandoned any claim that an order to move along infringes the Fourth Amendment. Instead, they claim that arrests under the ordinance violate the Fourth Amendment because "the ordinance makes it a crime to look suspicious." Resp. Br. 72.

Respondents' position cannot be squared with the plain language of the ordinance. The ordinance does not make it a crime "to look suspicious"; it criminalizes disobedience to a police order to disperse. When police make arrests under the ordinance, then, they act not on "suspicion," but on probable cause to believe that a police

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No. 97-1121

In the Supreme Court of the United States

OCTOBER TERM, 1997

CITY OF CHICAGO, PETITIONER

v.

JESUS MORALES, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a loitering ordinance making it a misdemeanor to disobey a police order to move on, given when a police officer has reasonable cause to believe that a group of loiterers contains one or more members of a criminal street gang, is impermissibly vague on its face in violation of the Due Process Clause.

2. Whether petitioner's ordinance, which requires a group of loiterers containing one or more criminal street gang members to obey a police order to move on, violates substantive due process guarantees.

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INTEREST OF THE UNITED STATES

The federal government has identified the control of gang-related crime and violence as an important priority. For example, in 1995, the Department's Office of Community Oriented Policing Services funded an Anti-Gang Initiative, which awarded $11 million in grants to a number of cities (including Chicago) to pursue various locally developed anti-gang strategies.[1] The Federal Bureau of Investigation has developed a National Gang Strategy for working with state and local governments to identify gang problems and to employ the anti-gang resources of each level of government in a coordinated and effective manner.[2]

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[1] Office of Community Oriented Policing Services, U.S. Dep't of Justice, *COPS Office Report: 100,000 Officers and Community Policing Across the Nation* 14 (Sept. 1997).

[2] Office of Investigative Agency Policies, U.S. Dep't of Justice, *Reducing Violent Crime in America: A Five-Year Strategy* 21-22 (May 1996).

The Department of Justice operates a grant program known as "Weed and Seed" which encourages cooperation among law enforcement and other agencies in targeted areas to "weed" out gangs and others involved in violent crime and drug activity, and to "seed" the areas with resources and community development. Congress has supported local efforts to address the problem of criminal street gangs by providing for enhanced penalties when certain federal crimes are committed in connection with such gangs. 18 U.S.C. 521 (Supp. II 1996).

The Chicago ordinance at issue in this case is one of several possible approaches to the problem of gang violence. The ordinance appears to have had a significant impact on gang violence in Chicago.[3] The federal government has a strong interest in supporting the efforts of local communities like Chicago to identify the law enforcement strategies best suited to each community's needs to combat gangs and gang-related violence.

STATEMENT

This case arises from respondents' challenges to their convictions for violating the City of Chicago's gang loitering ordinance. The Illinois Supreme Court held that the

[3] According to a report published by the City of Chicago and the Chicago Police Department, enforcement of the ordinance resulted in 5251 arrests in 1993, 15,660 arrests in 1994, and 22,056 arrests in 1995. Aggravated battery with a firearm, drive-by shootings, and homicides all decreased dramatically in 1995; moreover gang-related aggravated battery with a firearm and gang-related homicide declined markedly as a percentage of the (declining) total. Gang-related aggravated batteries climbed back to their prior levels in 1996 and 1997 (though total aggravated batteries did not); drive-by shootings declined further in 1996 and began climbing in 1997; gang-related homicides increased in 1996 but declined again in 1997 (while total homicides decreased in both years). *Gang and Narcotic Related Violent Crime: City of Chicago 1993-97* (June 1998). See also Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 Am. Crim. L. Rev. 191, 223-226 (1998) (reporting statistics and anecdotal accounts of effectiveness of ordinance from police officers and community residents).

ordinance was unconstitutionally vague on its face and violated substantive due process.

1. In May 1992 the Chicago City Council enacted a gang loitering ordinance following a series of hearings. In formal findings enacted as a preamble to the ordinance, the Council found that "the continuing increase in criminal street gang activity * * * is largely responsible for" the City's increasing rate of murder and other violent and drug-related crimes. Pet. App. 60a. The Council also found that "[i]n many neighborhoods throughout the City, the burgeoning presence of street gang members in public places has intimidated many law abiding citizens." *Ibid.* The Council found that "[o]ne of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas." *Ibid.* Gang members "maintain[] control over identifiable areas by continued loitering," but they "avoid arrest by committing no offense punishable under existing laws when they know the police are present." *Ibid.* As a result, "loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity." *Ibid.*

The ordinance itself provides in pertinent part:

> Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

Pet. App. 61a. The ordinance provides that "[i]t shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang." *Ibid.* Each violation of the ordinance is punishable by a fine of up to $500,

imprisonment for not more than six months, and performance of up to 120 hours of community service. *Id.* at 63a.

The ordinance defines each of its key terms. The ordinance provides that "'[l]oiter' means to remain in any one place with no apparent purpose." Pet. App. 61a. The definition of "[c]riminal street gang" is modeled in part upon the definition in the 1994 federal statute enhancing penalties for certain federal crimes when they are committed in connection with a criminal street gang. 18 U.S.C. 521 (Supp. II 1996). A "[c]riminal street gang" is defined as "any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more [of a series of enumerated crimes], and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." Pet. App. 61a-62a. The enumerated crimes include murder, aggravated assault or battery, intimidation, robbery and armed robbery, arson, possession of explosives, bribery, and drug trafficking. *Id.* at 62a. "Criminal gang activity" is defined as the commission or attempted commission of any of those enumerated crimes, so long as they are committed by two or more persons or by an individual acting "at the direction of, or in association with, any criminal street gang" and with the specific intent to "further[] or assist in any criminal conduct by gang members." *Ibid.* Finally, a "[p]attern of criminal gang activity" is defined as "two or more acts of criminal gang activity of which at least two such acts were committed within five years of each other and at least one such act occurred after the effective date of [the ordinance]." *Id.* at 63a.

After the City Council adopted the ordinance, the Police Department issued a general order that provided further guidance regarding the terms of the ordinance. The order provides that the ordinance "will be enforced only" within areas designated by district police commanders "in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding

community." Pet. App. 68a-69a. The general order also provides that "[p]robable cause to establish membership in a criminal street gang must be substantiated by the arresting officer's experience and knowledge" and must be "corroborated by specific, documented and reliable information." *Id.* at 67a. Such information would include items such as an individual's admission of membership, the wearing of distinctive gang insignia or colors, the use of distinctive gang signs or symbols, or the identification of an individual as a gang member by a reliable informant. *Id.* at 67a-68a. The general order provides that gang membership "may not be established solely because an individual is wearing clothing available for sale to the general public." *Id.* at 67a.

2. Respondents are 70 defendants who were charged with violating the gang loitering ordinance. Pet. App. 1a. Six of them were found guilty after separate bench trials and sentenced to jail terms from one to 27 days. *Id.* at 1a-2a. The trial courts dismissed each of the other cases, finding the ordinance unconstitutional on a variety of grounds. *Id.* at 1a. The state appellate court reversed the convictions and affirmed the dismissals. *Id.* at 2a.

3. The Illinois Supreme Court held that the ordinance "violates due process of law in that it is impermissibly vague on its face and an arbitrary restriction on personal liberties." Pet. App. 5a.

a. The court held that the ordinance is not "sufficiently defined so it provides persons of ordinary intelligence adequate notice of proscribed conduct." Pet. App. 7a. In the court's view, the term "loiter," even as defined by the ordinance to mean "to remain in any one place with no apparent purpose," is not "sufficiently definite so that ordinary persons can comprehend the prohibited conduct." *Id.* at 9a, 10a.

The court also held that the other elements of the offense do not cure the difficulty. The court construed the ordinance to include the additional element "that the arresting officer have a reasonable belief that one person in a

group of loiterers is a gang member," but concluded that this element too is vague because "[a]n individual standing on a street corner with a group of people has no way of knowing whether an approaching police officer has a reasonable belief that the group contains a member of a criminal street gang." Pet. App. 11a-12a. The court added that "even adding a knowing association with a gang member to the act of loitering is still insufficient because the city cannot 'forbid, on pain of criminal punishment, assembly with others merely to advocate activity, even if that activity is criminal in nature.'" *Id.* at 12a.

The court also held that the element of failure to obey a police dispersal order "is * * * insufficient to cure the vagueness of the ordinance." Pet. App. 12a. In the court's view, that conclusion was dictated by *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87, 90-92 (1965), in which this Court stated that a statute prohibiting standing or loitering after having been requested by a police officer to move on would be unconstitutional.

b. The court also held that the ordinance "provides such ambiguous definitions of its elements that it does not discourage arbitrary or discriminatory enforcement." Pet. App. 15a. In particular, the court believed that the definition of the term "loiter" "provides absolute discretion to police officers to decide what activities constitute loitering." *Ibid.* The court also stated that the ordinance gives police "complete discretion to determine whether any members of a group are gang members." *Ibid.* The court acknowledged that the police general order "goes to great lengths to define criminal street gangs." *Id.* at 16a. But the court stated that the general order "does absolutely nothing to cure the imprecisions of the definition of the 'loitering' element of the crime." *Ibid.*

c. With respect to the substantive due process challenge to the ordinance, the court referred to activities such as "loafing, loitering, and nightwalking," and held that "[t]he freedom to engage in such harmless activities is an aspect of the personal liberties protected by the due

process clause." Pet. App. 17a. The court stated that the gang loitering ordinance "impedes upon" a number of "protected personal liberties," including "the general right to travel, the right of locomotion, the right to freedom of movement, and the general right to associate with others." *Id.* at 18a (citations omitted). Although the court recognized that these liberties "are not absolute," the court found "that the gang loitering ordinance unreasonably infringes upon personal liberty." *Ibid.* In the court's view, "[p]ersons suspected of being in criminal street gangs are deprived of the personal liberty of being able to freely walk the streets and associate with friends, regardless of whether they are actually gang members or have committed any crime." *Ibid.*

INTRODUCTION AND SUMMARY OF ARGUMENT

The problem of gang-related crime and violence has dramatically increased in recent years. Criminal street gangs increasingly attempt to control entire neighborhoods, intimidating the law-abiding citizens who live there and making it impossible for them to enjoy the amenities of public life. Experience has repeatedly demonstrated that, once such gangs take control of the sidewalks and streets, the ordinary social mechanisms that tend to inhibit crime and other anti-social behavior cease working. Although attacking the homicides, drug crimes, and other serious crimes that gangs commit is one facet of the solution, effective efforts to combat gang activity may also require targeted community-based efforts to reacquire control of the streets from violent street gangs and restore public spaces to the use and enjoyment of the vast majority of residents. The Chicago City Council, acting with the support of community organizations and the city's police department, concluded that the ordinance adopted is the best approach to achieving that goal in the particular circumstances faced by a city that has been one of the most hard-hit by gang violence.

The gang loitering ordinance is not unconstitutionally vague. Because the ordinance applies only to those who

loiter for "no apparent purpose," it excludes from its scope those whose presence in a public place has as its purpose the expression of ideas protected by the First Amendment. Each of its key terms is carefully defined and has a meaning that is comprehensible to persons of ordinary intelligence and common sense. The term "loiter" is defined to mean "to remain in any one place with no apparent purpose." Pet. App. 61a. As we discuss below, that is not an unintelligible standard. Moreover, the ordinance imposes additional requirements for a conviction, including proof "that the arresting officer have a reasonable belief that one person in a group of loiterers is a gang member," *id.* at 11a, and—most significantly—proof that the defendant has received and disobeyed a police order to disperse. Taken together, those requirements are sufficient to give fair notice to persons subject to the ordinance how they may conform their conduct to the law.

The ordinance also contains standards that satisfactorily confine police enforcement discretion. It does not permit police to sweep the streets of persons whom they find undesirable or annoying, or to remove minority or disfavored groups from the City. Instead, in light of the careful definition of each of its terms and the further requirements in the general police order, it permits the police to apply the ordinance only in areas where gang activity has threatened the local community and only against persons who, by virtue of their membership in criminal street gangs or their participation in groups containing such members, pose a particular threat to the community. Even as to such persons, the ordinance simply prohibits them from loitering in groups, and it authorizes arrests only of individuals who disobey police orders to disperse. In short, the ordinance provides far more notice and precise standards for enforcement than did the standardless ordinances this Court found unconstitutionally vague in *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972), and *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971), or the ordinance that this Court commented would be unconstitutional in *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87 (1965).

The ordinance also does not violate substantive due process guarantees. It implicates two specific liberty interests—the interest of gang members in standing in groups on the streets and sidewalks and in other public places in designated areas of the city, and the interest of non-gang members in standing in public places with gang members in those designated areas. Those interests are not commensurate with any of the fundamental liberty interests—affecting the most intimate personal relations and the core of family life—whose infringement may be justified only if narrowly tailored to serve a compelling state interest. Moreover, the City's interest in public safety, which forms a part of the justification for the ordinance, has frequently been found sufficient to justify substantially more serious intrusions on personal liberty, such as pretrial confinement on the basis of future dangerousness. *United States* v. *Salerno*, 481 U.S. 739, 748 (1987). And the specific prohibitions of the ordinance are narrowly tailored to advance the purposes of the ordinance in returning the City's public spaces to law-abiding citizens and ultimately reducing the level of crime, fear, and violence in the specific areas of the City plagued with gang violence and intimidation.

ARGUMENT

I. THE GANG LOITERING ORDINANCE IS NOT UNCONSTITUTIONALLY VAGUE ON ITS FACE

A. The Ordinance Provides Reasonable Notice, In At Least A Wide Range Of Its Applications, Of What Conduct Is Prohibited

The vagueness doctrine is based on the proposition that, "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972).

Laws that fail to provide that kind of notice "may trap the innocent by not providing fair warning," *ibid.*, and they therefore fail to satisfy due process standards.

The fact that a law has some imprecision, however, is not sufficient to render it unconstitutional. "Condemned to the use of words, we can never expect mathematical certainty from our language." 408 U.S. at 110. Moreover, the fact that the terms used in a statute have uncertain application to some conceivable conduct is insufficient to support a ruling, like that of the Illinois Supreme Court in this case, that the statute is unconstitutional on its face. Instead, under well-settled standards, facial invalidation is permissible only if the challenged law is "impermissibly vague in all of its applications." *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates*, 455 U.S. 489, 497 (1982). If the challenged law imposes reasonably intelligible standards in some factual settings, the law may constitutionally be applied in those settings; vagueness questions that arise in other settings should be resolved if and when cases involving as-applied claims in those settings arise. See, *e.g.*, *Maynard* v. *Cartwright*, 486 U.S. 356, 361 (1988) ("Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk."); *United States* v. *Powell*, 423 U.S. 87, 92-93 (1975); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975).

1. Although the vagueness doctrine in general imposes only a modest restriction on the framing of criminal laws, "a greater degree of specificity" is required where the challenged law regulates expressive conduct protected by the First Amendment. *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974). Such laws require special treatment to avoid a chilling effect on expression that may be close to the line of illegal conduct. See *Village of Hoffman Estates*, 455 U.S. at 499; *Grayned*, 408 U.S. at 109.

The Chicago gang loitering ordinance does not in any meaningful sense limit expression protected by the First

Amendment and is therefore not subject to this more stringent test. If a group of people standing in a public place are engaged in expressive conduct protected by the First Amendment, such as picketing, holding a demonstration, campaigning for a candidate, or gathering signatures on a petition, the group's message—and its purpose of conveying that message—will be apparent to outsiders. The ordinance's definition of "loiter," however, applies only to those who are standing in a public place "with no apparent purpose." Pet. App. 61a. Therefore, the ordinance by its terms does not apply to those who are gathered for the purpose of engaging in protected expression.

Nor does the gang loitering ordinance limit the freedom of association. In *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), this Court explained that two different sorts of freedom of association have received constitutional protection. One sort relates to "choices to enter into and maintain certain intimate human relationships," *id.* at 617, which generally involve "the creation and sustenance of a family" through "marriage, childbirth, the raising and education of children, and cohabitation with one's relatives," *id.* at 619 (citations omitted). Those rights, which are protected as "fundamental element[s] of personal liberty" protected by the Due Process Clause, *id.* at 618, are not implicated by the gang loitering ordinance.

The other sort of conduct that comes within the freedom of association involves "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." 468 U.S. at 618. The Illinois Supreme Court correctly stated that the government may not "forbid, on pain of criminal punishment, assembly with others merely to advocate activity." Pet. App. 12a (citing, *inter alia*, *Brandenburg* v. *Ohio*, 395 U.S. 444, 448-449 (1969)). But the gang loitering ordinance, as noted above, does not forbid such assembly, because those exercising this right of assembly have expressive activ-

ity—advocacy—as their purpose. The ordinance, by contrast, prohibits only association "with no apparent purpose." The First Amendment does not include "a generalized right of 'social association' that includes chance encounters," *City of Dallas* v. *Stanglin*, 490 U.S. 19, 25 (1989), and the ordinance therefore is not subject to the heightened review for vagueness applicable to laws that affect First Amendment rights of expression.[4]

2. a. Under ordinary vagueness standards, the ordinance is constitutional. The ordinance defines the term "loiter" to mean "to remain in any one place with no apparent purpose." That is not an unintelligible standard. As the Illinois Supreme Court indicated, application of the ordinance does not turn on the actual purpose of the group of suspected gang loiterers, but whether that purpose is "apparent to an observing police officer." Pet. App. 10a. Moreover, the terms of the ordinance suggest that the "apparent purpose" inquiry is based on the apparent purpose for "remain[ing] in any one place." Thus, a group that is talking or smoking while remaining in one place would not ordinarily have an apparent purpose, since it would rarely be apparent to an observer that the group's purpose for remaining in that place—rather than walking or moving elsewhere—was to talk or smoke.[5] Finally, the purpose simply to stand on a corner cannot be an "apparent

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[4] In the Illinois Supreme Court, respondents argued that the ordinance impinged on protected expression because those subject to the ordinance may be talking while they are loitering. See Defendants-Appellees Ill. Sup. Ct. Br. 13-14. The ordinance, however, does not prohibit or regulate talking. It merely requires those loitering with criminal street gang members to move on when ordered to do so.

[5] It is a factual question in each case whether a group has an apparent purpose for remaining in one place. In some circumstances it may be apparent that a group's purpose for remaining in one place is to smoke cigarettes—for example, where the group is smoking during business hours outside an office building in which smoking is known to be prohibited. Far from suggesting that the ordinance is vague, such examples demonstrate that the standard embodied in the ordinance may be intelligibly applied to a variety of factual circumstances.

purpose" under the ordinance; if it were, the ordinance would prohibit nothing at all.

In accordance with those standards, the statutory term "loiter" would likely include standing on a street corner or in front of a school or business and making no effort to enter a building or to engage in conduct conveying a message. On the other hand, the statutory term would not likely include attending a sporting event, waiting in line to enter a theater, or waiting at a bus stop until a bus arrives.[6] The term "loiter" thus has a core meaning that distinguishes proscribed from permitted conduct.

In each of the four full trials conducted below, the "no apparent purpose" issue was resolved as a straightforward question of fact, insofar as it was litigated at all.[7] In each case a police officer testified that he had observed the respondent standing in one place with no apparent purpose for a period of time.[8] Three of the respondents testified, to the contrary, that they were arrested while they were walking to another location; the fourth did not testify or put on any evidence on the issue.[9] The trial court credited

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[6] Contrary to the suggestion of the Illinois Supreme Court, Pet. App. 10a, the purpose of "a person waiting to hail a taxi, resting on a corner during a jog, or stepping into a doorway to evade a rain shower" will ordinarily be apparent to an observer.

[7] The other two cases that resulted in convictions were tried on stipulated facts or stipulated testimony, which addressed this issue in conclusory terms. See Br. for Defendant-Appellant at 3, *Chicago* v. *Garvin*, No. 93-4356 (Ill. App. Ct, 1st Div.) (stipulated testimony that defendant was loitering); Br. for Defendant-Appellant at 3, *Chicago* v. *Jimenz*, No. 93-4351 (Ill. App. Ct., 1st Div.)(stipulated that defendant "knowingly remained at a known designated location for criminal street activity, after being informed by a police officer to disperse from this area.").

[8] *Chicago* v. *Gutierrez*, 4/12/94 Tr. 12, 15-16, 18-19; *Chicago* v. *Morales*, 9/20/93 Tr. 6-11; *Chicago* v. *Washington*, 7/14/94 Tr. 9-11, 17-19; *Chicago* v. *Renteria*, 9/29/94 Tr. 16-19, 21-24.

[9] One respondent claimed that he was walking to meet his mother. *Chicago* v. *Gutierrez*, 4/12/94 Tr. 24-29. Another claimed that he was walking home from the hospital. *Chicago* v. *Morales*, 9/20/93 Tr. 17-18. A third said he was walking out of a store to rejoin a friend who had

the officer rather than the testifying defendants, indicating that if it had credited the defendants it would have acquitted them.[10] The experience in trying cases under the ordinance thus shows no confusion or dispute about what constitutes an "apparent purpose," and shows that the term "loiter" has a core meaning that is sufficient to preclude a facial vagueness challenge. Possible unconstitutional applications, or questions about the interpretation of the ordinance's standard at the margins, should be resolved on an as-applied basis.

A comparison with the ordinance this Court held unconstitutionally vague in *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971), is instructive. The operative language in the ordinance in *Coates* prohibited three or more people from assembling on a sidewalk and "conduct[ing] themselves in a manner annoying to persons passing by." *Id.* at 611. Noting that "[c]onduct that annoys some people does not annoy others," *id.* at 614, the Court explained that therefore rather than "requir[ing] a person to conform his conduct to an imprecise but comprehensible normative standard, * * * no standard of conduct is specified at all." *Ibid.* Unlike the ordinance in *Coates*, the term "loiter" in the Chicago gang loitering ordinance does specify a standard of conduct. At least in combination with the other requirements of the ordinance, it is not unconstitutionally vague.

b. The Illinois Supreme Court acknowledged that "persons of ordinary intelligence may maintain a common and accepted meaning of the word 'loiter.'" Pet. App. 9a. But the court stated that "such term by itself is inadequate to inform a citizen of its criminal implications." *Ibid.* In the court's view, "[t]he infirmity" of the use of the

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waited outside with a group of others. *Chicago* v. *Washington*, 7/14/94 Tr. 28-31. A fourth, Jose Renteria, did not testify, and did not otherwise claim that he had an apparent purpose in standing on the street.

[10] *Chicago* v. *Gutierrez*, 4/12/94 Tr. 32; *Chicago* v. *Morales*, 9/20/93 Tr. 22-23; *Chicago* v. *Washington*, 7/14/94 Tr. 35; *Chicago* v. *Renteria*, 9/29/94 Tr. 36.

term "is that it fails to distinguish between innocent conduct and conduct calculated to cause harm and 'makes criminal activities which by modern standards are normally innocent.'" *Ibid.* (quoting *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 163 (1972)). Even as defined by the ordinance, the court held, "[p]eople with entirely legitimate and lawful purposes will not always be able to make their purposes apparent to an observing police officer." *Id.* at 10a.

The Illinois Supreme Court's reasoning is unsound. It is not the task of a court, in adjudicating a vagueness challenge to a statute, to determine whether the statute criminalizes only "conduct calculated to cause harm." It is up to the legislature to determine what conduct is likely to cause harm in a given community, and the City Council's determination that gang loitering is likely to cause harm in Chicago was fully supported by the record and should be conclusive. Nor does the constitutionality of an ordinance depend on whether it "makes criminal activities which by modern standards are normally innocent." Social problems—and tolerance of disorder—vary among different communities and even in the same community at different times. It is a part of the substantive due process inquiry, see pp. 22-30, *infra*, to determine whether a particular prohibition falls within a community's wide discretion to subject particular conduct to the sanctions of the criminal law. Judicial second-guessing of a community's determinations regarding conduct that should be criminalized is not, however, a part of the vagueness inquiry. If conduct is adequately defined in a criminal statute to give fair notice and avoid standardless discretion, the fact that it is "by modern standards * * * normally innocent," *Papachristou*, 405 U.S. at 153, is "not a defect of clarity." *Village of Hoffman Estates*, 455 U.S. at 497 n.9.

3. Conviction under the ordinance requires not only proof of loitering, but also proof of other requirements as well. The addition of those elements is sufficient to satisfy fair notice requirements, regardless of any indeter-

minacy that may inhere in the term "loiter," as defined by the ordinance.

a. As the Illinois Supreme Court recognized, proof of a violation of the ordinance requires proof "that the arresting officer have a reasonable belief that one person in a group of loiterers is a gang member." Pet. App. 11a. In at least a great many cases, persons subject to the statute can be expected to know whether they are loitering with gang members and whether the police officer issuing the order has a reasonable belief that gang members are present. Indeed, because it is important to the gang to assume visible control over an area, members of gangs often wear distinctive clothing, colors, and insignia, and employ distinctive hand signals;[11] and they frequently freely admit to their membership in the gang.[12] The intimidating effect of gang loitering—one of the primary evils against which the ordinance was directed—results precisely because gang members and affiliates loitering in public places make their status as gang members clear to onlookers. In addition, the gang's recruiting function—also a target of the ordinance—depends on easy recognition of the gang affiliation of a group of loiterers. See *id.* at 2a (City Council heard testimony that "gang members loiter as part of a strategy to claim territory, recruit new members, and in-

[11] In three of the four full trials resulting in convictions below, the police officers testified that respondents and/or others in the group with which they were loitering admitted gang membership. See *Chicago* v. *Gutierrez*, 4/12/94 Tr. 11-12; *Chicago* v. *Morales*, 9/20/93 Tr. 7; *Chicago* v. *Washington*, 7/14/94 Tr. 10, see also *id.* at 4. In the fourth case, although the police officer did not testify to an admission by the defendant himself, the officer stated that gang members "admit they are gang members and they are very proud of it." *Chicago* v. *Renteria*, 9/29/94 Tr. 13; see also *id.* at 11 (gang members "readily admit" membership).

[12] As a recent monograph published by a Department of Justice component noted in its definition of "street gang," "[t]he group frequently identifies with or claims control over specific territory (turf) in the community, wears distinctive dress and colors, and communicates through graffiti and hand signs." Bureau of Justice Assistance, *Urban Street Gang Enforcement* 30 (1997).

timidate rival gangs and ordinary community residents."). Accordingly, individuals may in most cases readily determine whether they are engaging in gang loitering subject to the ordinance.[13]

b. The ordinance also requires proof that the defendant failed to obey a police order to disperse. Even if fair notice were a close question based on the other requirements of the statute, this element would be sufficient to cure any problem. A person of ordinary intelligence and common sense who receives a police order to disperse under the ordinance should be in no doubt about "what is prohibited" and should easily be able to "act accordingly." *Grayned*, 408 U.S. at 108. Criminal statutes ordinarily are enforced with far less specific notice than occurs under the Chicago gang loitering ordinance. A person who fails to obey a police order to disperse under the ordinance cannot complain of lack of fair notice.

This Court's decision in *Colten* v. *Kentucky*, 407 U.S. 104 (1972), makes clear that the Chicago ordinance provides fair notice. In *Colten*, the statute under challenge prohibited "[c]ongregat[ing] with other persons in a public place and refus[ing] to comply with a lawful order of the police to disperse," when done "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof." See *id.* at 108. This Court rejected the

[13] There may be cases in which a defendant can show that he had no way to determine whether or not a police officer could have had a reasonable belief that a gang member was present in a group of loiterers. If such a case arises, the question presented would be whether the other requirements of the statute—especially the requirement of an order to move on—were sufficient to have given the defendant "a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). Regardless of the answer to that question, the existence of some such cases would not render the statute unconstitutionally vague on its face—*i.e.*, incapable of application even where the gang affiliation of members of a group of loiterers is in no way unclear. Cf. *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

defendant's argument that the statute did not provide fair notice, explaining that a person who satisfies the other elements of the statute "should understand that he could be convicted under [the statute] if he fails to obey an order to move on." *Id.* at 110. The ordinance in this case requires the same police dispersal order as in *Colten*. Accordingly, as in *Colten*, "citizens who desire to obey the statute will have no difficulty in understanding it." *Ibid.*

The Illinois Supreme Court ignored *Colten* in its analysis of fair notice. Instead, that court relied on *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87, 90 (1965), in which this Court noted that an ordinance that, without more, made it "unlawful for any person to stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on" would be unconstitutionally vague. The Illinois Supreme Court stated that "[t]he proscriptions of the gang loitering ordinance are essentially the same as the *Shuttlesworth* ordinance" and relied upon *Shuttlesworth* for the principle that "if the underlying statute is itself impermissibly vague, * * * then a conviction based upon failure to obey the order of a police officer pursuant to that statute cannot stand." Pet. App. 13a.

The Chicago gang loitering ordinance is not "essentially the same" as the ordinance in *Shuttlesworth*. The ordinance in *Shuttlesworth*, "[l]iterally read, * * * says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer." 382 U.S. at 90. That, together with the ordinance's "ever-present potential for arbitrarily suppressing First Amendment liberties," *id.* at 91, was the basis for this Court's ruling. In contrast, the Chicago gang loitering ordinance, especially together with the accompanying police order, has extensive definitions of its key terms that very substantially limit police discretion, see pp. 19-20, *infra*, and it does not substantially affect expressive activities protected by the First Amendment.

Shuttlesworth does not, as the Illinois Supreme Court stated, stand for the principle that a police order requirement can never help to cure a statute that might otherwise be impermissibly vague; at most it condemns a hypothetical statute that penalizes violation of a police order alone, without any standards to guide the issuance of the order. 382 U.S. at 90-91. The Chicago ordinance, however, contains both a requirement of a police order, and standards for issuing the order. In combination, these two elements save the statute from vagueness, whether or not either one alone would suffice. A statute taken as a whole may provide fair notice despite the fact that some of its elements, taken alone, fail to do so—and this is so even where the statute regulates expression, and is therefore subject to particularly stringent vagueness requirements. *Reno* v. *ACLU*, 117 S. Ct. 2329, 2345 (1997) ("Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague."). Similarly here, the ordinance as a whole—including in particular the police order requirement—provides fair notice of the conduct that it prohibits, so that individuals may conform their conduct to law.

B. The Ordinance Does Not Encourage Arbitrary And Discriminatory Enforcement

The "more important aspect of the vagueness doctrine" is "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983). The ordinance satisfies that requirement.

1. As noted above, the key terms in the statute are carefully defined. The ordinance provides that individuals may be asked to move on only based on a reasonable belief that they are "loitering"—a defined term whose meaning has already been discussed—with one or more persons, at least one of whom is reasonably believed to be a gang member. A "gang" is defined as a group of three or more persons that has "as one of its substantial activities" the commission of enumerated serious criminal offenses, and

whose members commit, attempt to commit, or solicit the commission of those offenses, provided that they are committed "with the specific intent to promote, further, or assist in any criminal conduct by gang members." Pet. App. 61a-62a. That definition substantially limits police discretion. In precise terms, it aims the statute's prohibitions at those who choose to affiliate with criminal organizations. Even as to those persons, it may not be used simply to arrest all members of such organizations, but simply requires them to move on when ordered to and continue their activities—whatever they may be—without loitering. Cf. *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939) (holding unconstitutionally vague a statute making it a crime to be a gang member who has no occupation and has been convicted of a prior offense).

The Chicago ordinance does not suffer from the vices of the ordinance before this Court in *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 156-157 n.1 (1972). That ordinance included a list of crimes—including nightwalking, wandering about from place to place without any lawful purpose or object, loafing, living upon the earnings of one's wife—that was "so all-inclusive and generalized" that "those convicted may be punished for no more than vindicating affronts to police authority." *Id.* at 166-167. The fact that in *Papachristou* there were "no standards governing the exercise of the discretion granted by the ordinance," *id.* at 170, permitted police in effect to criminalize the failure by disfavored groups "to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts." *Ibid.* By contrast, no one is guilty of a crime under the Chicago ordinance merely because of lifestyle, and even those subject to the act are not made criminals, but are merely required to disperse when requested to do so by police under the ordinance.

2. This Court has frequently considered administrative enforcement guidelines in evaluating vagueness claims. For example, in *Village of Hoffman Estates*, the Court relied in part on "guidelines prepared by the Village

Attorney," 455 U.S. at 492-493 & n.3, in holding that the terms in a local drug paraphernalia ordinance were not unconstitutionally vague. *Id.* at 500-501 & n.18; see also *id.* at 504 ("The village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance.").[14]

The police order in this case further limits the discretion granted the police. First, the general order provides that the ordinance "will be enforced only" within areas designated by district police commanders "in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community." Pet. App. 68a-69a. The order therefore limits the enforcement of the ordinance to specific areas of the city in which gang loitering poses a present threat and in which reasonably thorough and nondiscriminatory enforcement is a practical, achievable goal. That in itself vitiates the possibility that the ordinance could be used as a general license to trap or harass disfavored individuals throughout the city.

Second, the general order includes detailed instructions concerning how police officers may establish that an individual is a gang member. The order provides that such membership "must be substantiated by the arresting officer's experience and knowledge" and must be "corroborated by specific documented and reliable information." Pet. App. 67a. The order goes on to detail the types of information that would be sufficient in this regard (*e.g.*, an individual's admission of membership, the wearing

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[14] See also *Kolender* v. *Lawson*, 461 U.S. 352, 355 (1983) (court must "consider any limiting construction that a state court *or enforcement agency* has proffered") (emphasis added); *Parker* v. *Levy*, 417 U.S. 733, 754 (1974) ("[E]ven though sizable areas of uncertainty as to the coverage of the articles may remain after their official interpretation by authoritative * * * sources, further content may be supplied even in these areas by less formalized custom and usage."); *Ehlert* v. *United States*, 402 U.S. 99, 105, 107 (1971) (relying on "reasonable, consistently applied administrative interpretation" and "letter included in the briefs" from administrative authorities regarding "present practice").

of distinctive gang insignia or colors, the use of distinctive gang signs or symbols, or the identification of an individual as a gang member by a reliable informant, *id.* at 67a-68a), as well as some types of information that would be insufficient (*e.g.*, the wearing of "clothing available for sale to the general public," *id.* at 67a).

Taken together, the definition of the key terms in the ordinance itself and the further specifications in the police general order limit the enforcement discretion of police officers well within reasonable standards. The ordinance therefore does not suffer from the defect of the statute held unconstitutional in *Kolender*, which required individuals to provide "credible and reliable" identification to police officers on request, and which "contain[ed] no standard for determining what a suspect has to do in order to satisfy [that] requirement." 461 U.S. at 358. The ordinance also does not remotely resemble the wide-ranging ordinances that delegated virtually standardless discretion to the police in *Papachristou*, *Coates*, or *Shuttlesworth*, to stop and/or arrest anyone they wished.

II. THE CHICAGO GANG LOITERING ORDINANCE DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS GUARANTEES

This Court has held that the Due Process Clause has a substantive component, which "bar[s] certain government actions regardless of the fairness of the procedures used to implement them." *County of Sacramento* v. *Lewis*, No. 96-1337 (May 26, 1998), slip op. 5. The "core of the concept" of substantive due process is "protection against arbitrary action," and against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Id.* at 10, 11. It "specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington* v. *Glucksberg*, 117 S. Ct. 2258, 2268 (1997) (citations and internal quotation marks omitted).

A. The Ordinance Implicates Liberty Interests

1. This Court has noted that substantive due process analysis requires "a careful description of the asserted fundamental liberty interest." *Glucksberg*, 117 S. Ct. at 2268 (internal quotation marks omitted). The Illinois Supreme Court described a number of liberty interests it believed were at stake in this case. It stated that activities such as "loafing, loitering, and nightwalking" are "amenities of American life," and "[t]he freedom to engage in such harmless activities is an aspect of the personal liberties protected by the due process clause." Pet. App. 17a (citing *Papachristou*, 405 U.S. at 164). The court also referred to "the general right to travel, the right of locomotion, the right to freedom of movement, and the general right to associate with others." Pet. App. 18a (citations omitted). In the court's view, "[t]he gang loitering ordinance impedes upon [*sic*] all of these personal liberty interests." *Ibid.*

We do not doubt that, under the Due Process Clause, individuals in this country have significant liberty interests in standing on sidewalks and in other public places, and in traveling, moving, and associating with others. But characterization of the interests at that level of generality is of limited utility in this case, because in ordinary application the gang loitering ordinance does not deprive individuals of some of those interests (*e.g.*, the interests in traveling and moving) at all, and it deprives individuals of other interests (*e.g.*, standing in public places and associating with others) only to a limited extent and only in some circumstances. Although the justifications for the gang loitering ordinance may not justify depriving all citizens of Chicago of these interests in their entirety, the justifications are sufficient to justify the ordinance's much more limited effect. Accordingly, a more tailored description of the liberty interest at stake in this case is required.

2. The Chicago gang loitering ordinance implicates two distinct liberty interests. First, it implicates the interest of gang members in standing in public places with others in areas of the City designated pursuant to the police general order; gang members who do so "with no apparent purpose" may expect to receive police orders to disperse. See Pet. App. 61a (ordinance provides that police officer observing persons engaged in gang loitering "*shall* order all such persons to disperse and remove themselves from the area") (emphasis added). Second, it implicates the interest of non-gang members in standing in public places with one or more gang members in designated areas of the City; non-gang members who do so "with no apparent purpose" are also subject to police orders to disperse.

The ordinance has a somewhat different effect on each of those liberty interests. With respect to gang members, the ordinance deprives them of a large part of their interest in standing in public places in the company of others. They may, of course, freely walk with whomever they wish.[15] They may stand wherever they wish in areas of the city not designated by the police general order. Even in designated areas, they may stand where they wish, so long as they do so alone. And they may stand in public places with individuals of their choice in designated areas, so long as their apparent purpose in doing so is not merely to loiter—*i.e.*, they may do so to attend a sporting event or concert, to exercise their First Amendment rights of expression, to wait for a taxi or bus, etc. But their ability merely to stand on the streets and sidewalks and in other public places in designated portions of the city and socialize with others is severely constricted by the ordinance.

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[15] The Illinois Supreme Court erred when it stated that "[p]ersons suspected of being in criminal street gangs are deprived [by the ordinance] of the personal liberty of being able to freely walk the streets and associate with friends." Pet. App. 18a. The ordinance does not prohibit anyone from "freely walk[ing] the streets." Its effect is limited to prohibiting standing with gang members in one place with no apparent purpose.

With respect to non-gang members, the ordinance imposes a much more limited restriction. Non-gang members may continue to stand with whomever they want, wherever they want, with one exception: they may not loiter with gang members in designated areas of the city. Of course, although that is a more limited restriction, it potentially affects a far larger number of people.

B. The Interests Supporting The Gang Loitering Ordinance Are Sufficient To Justify Its Limited Intrusion On The Identified Liberty Interests

The recognition of an interest as one encompassed within the meaning of the term "liberty" is only the first step in deciding whether a law violates substantive due process. It then must be determined, based on an objective analysis of "[o]ur Nation's history, legal traditions, and practices," *Washington* v. *Glucksberg*, 117 S. Ct. at 2268, whether the government's justifications for overriding the liberty interests at stake are sufficient. The strength of the justification that is required depends upon the nature and character of the liberty interest at stake. See *Cruzan* v. *Director, Mo. Dep't of Health*, 497 U.S. 261, 279 (1990) (liberty interest in refusing medical treatment must be balanced against the relevant state interests); *Williamson* v. *Lee Optical of Ok., Inc.*, 348 U.S. 483, 491 (1955) (state restriction affecting a person's ability to engage in a business must merely be rationally related to a legitimate government purpose); *Reno* v. *Flores*, 507 U.S. 292, 301-302 (1993) (infringement of certain fundamental liberty interests must be narrowly tailored to serve a compelling interest).

1. This Court has recognized that infringement of certain fundamental interests that go to the heart of personal privacy and autonomy may be justified only by a showing that the infringement is "narrowly tailored to serve a compelling state interest." 507 U.S. at 302; *Glucksberg*, 117 S. Ct. at 2267. Such liberty interests "include[] the rights to marry, to have children, to direct the education

and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Glucksberg* at 2267 (citations omitted). The liberty interests at stake in this case do not fall within that category, and the Illinois Supreme Court did not suggest that they did.

2. That is not to denigrate the importance of the liberty interests that are at stake in this case. This Court recognized in *Papachristou* that the ability to stand on a sidewalk and meet one's friends and neighbors, or to sit on a sidewalk bench with others and watch the passing show, are "unwritten amenities [that] have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity." 405 U.S. at 164. In most circumstances, the American people treasure such innocent "amenities," and the government has little occasion or basis to interfere with them.

This Court, however, has "repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." *United States* v. *Salerno*, 481 U.S. 739, 748 (1987). In *Salerno*, that interest was found sufficient to justify a complete deprivation of liberty—pretrial detention on the basis of future dangerousness. The record in this case demonstrates that the Chicago City Council had a sufficient basis to justify the far less severe restriction on liberty in the gang loitering ordinance.

a. The Illinois Supreme Court stated that the ordinance was "arbitrarily aimed at persons based merely on the suspicion that they may commit some future crime." Pet. App. 18a. That is incorrect. The ordinance itself defines a crime based on the present threat to public order caused by gang loitering. As the Preamble to the ordinance recites, the City of Chicago was "experiencing an increasing murder rate as well as an increase in violent and drug related crimes." *Id.* at 60a. The City Council, after holding extensive hearings, determined that "the continuing increase in criminal street gang activity * * * is largely responsible for this unacceptable situation." *Ibid.* A key part of the problem was that "criminal street gangs establish control over identifiable areas * * * by loitering in those areas" and "intimidat[ing] many law abiding citizens." *Ibid.* Such loitering "creates a justifiable fear for the safety of persons and property in the area." *Ibid.* The City Council concluded that "[a]ggressive action is necessary to preserve the City's streets and other public places so that the public may use such places without fear." *Id.* at 61a.

Those findings were not only supported by the record before the City Council, but also are consistent with data gathered from many other communities. By the early 1990's, 95% of the nation's largest cities and 88% of smaller cities in the nation reported gang problems.[16] Most prevalent in areas in which the population is economically disadvantaged, criminal street gangs have attracted a growing number of young people to a life of violence and crime. A component of the Department of Justice has identified more than 23,000 youth gangs in the nation, with more than 650,000 members.[17] In 1994, criminal street gangs accounted for more than 1000 gang-related homicides in Chicago and Los Angeles alone.[18] Gang in-

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[16] Office of Investigative Agency Policies, U.S. Dep't of Justice, *Reducing Violent Crime in America: A Five-Year Strategy* 4 (May 1996).

[17] Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, *1995 Nat'l Youth Gang Survey: Program Summary* 12, 15 (1997).

[18] Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, *OJJDP Fact Sheet #72* (1997). Chicago has been particularly hard-hit by gang violence. In 1995, Chicago's total of 33,000 gang members was second only to Los Angeles among American cities. *1995 Nat'l Youth Gang Survey* at 16. In 1994, there were 240 gang-motivated homicides in Chicago, an all-time high and a five-fold increase from the number in 1987. Ill. Criminal Justice Information Auth., *Research Bulletin* 4 (Sept. 1996). Between 1987 and 1994, 138 of the 956 gang-related homicide victims were not gang members, including 12 victims age nine or younger. *Id.* at 10, 13. Of the 956 homicides, 120 were drive-by shootings. *Id.* at 18.

timidation of witnesses makes prosecution of those homicides — as well as prosecution of the numerous other serious crimes committed by street gang members—particularly difficult.

b. Faced with that threat to public safety, the City adopted a reasonable approach. Once criminal street gangs obtained control of the streets in an area, the fear and intimidation they spawned deprived law-abiding citizens of the ability to meet with friends and neighbors in public places and otherwise enjoy these amenities of American life. The City's response was to take action so that the amenities discussed in *Papachristou* could be restored to the vast majority of the citizens in the troubled areas. That end, if reached, would lead to the reestablishment of social controls in those areas and a concomitant reduction in fear, gangs, and violent crime. See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551, 578-585 (1997) (citing sources).[19]

The ordinance's substantial intrusion on the liberty interests of gang members is justified. Under the ordinance, a "[c]riminal street gang" is a group that has "as one of its substantial activities the commission" of one of a

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[19] While the precise form of the Chicago ordinance is novel, vagrancy and loitering statutes have a long history, as the Court noted in *Papachristou*, 405 U.S. at 161-162. See also Livingston, *supra*, at 595 (citing authorities for proposition that, prior to *Papachristou*, "[m]ost states had loitering, drunk and disorderly, and vagrancy statutes, in addition to laws prohibiting breaches of the peace, disorderly conduct, and specific forms of public disorder.") (internal quotation marks omitted). While some of those statutes are unconstitutionally vague under modern standards, the ubiquitousness of such statutes shows that the history and traditions of our people do not recognize the right claimed by respondents to loiter at will, regardless of the threat to lawful community life thereby created. See *Washington* v. *Glucksberg*, 117 S. Ct. 2258, 2268 (1997) ("Our Nation's history, legal traditions, and practices * * * provide the crucial guideposts for responsible decisionmaking that direct and restrain our exposition of the Due Process Clause.") (internal quotation marks and citation omitted).

series of enumerated serious crimes, such as murder, aggravated battery, intimidation, armed robbery, arson, and drug offenses. Pet. App. 61a-62a. The members of such a gang must "individually or collectively engage in or have engaged in a pattern of criminal gang activity," requiring the commission of at least two offenses. *Id.* at 62a-63a. Criminal organizations of this sort pose a particular threat to the communities in which they operate. The City reasonably believed that denying control of the streets and public areas to gang members was an essential element of attacking that threat. The ordinance intrudes on the liberty interests of those who choose to join criminal street gangs to precisely the extent necessary to address the control of the streets by such gangs. In addition, gang members may remove this disability by discontinuing their membership in the gang.

The ordinance's somewhat lesser intrusion on the liberty interests of those who are not gang members is also justified. Their conduct is implicated only when they loiter with gang members. The City reasonably believed that, once a group of people loitering in a particular area becomes identified with a particular gang, the group itself poses the threats of intimidation of law-abiding citizens, coercive recruiting practices, inter-gang violence, and the like. Even if it were practical to identify all of the actual gang members in the group and then to require only the gang members to disperse, the City reasonably concluded that that would not solve the problem. In the eyes of onlookers—including both law-abiding citizens and rival gangs—the group's identity would persist and the threats to public safety posed by the group would persist. Accordingly, the City reasonably concluded that, where gang members loiter in a group, the group itself had to be dispersed to eliminate the threat. The ordinance is tailored to intrude upon the interests of non-gang members only to the extent necessary to accomplish that goal.[20]

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[20] In addition, the City Council was aware of the threat posed by drive-by shootings and other gang-related violence. See Pet. App. 2a

CONCLUSION

The judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted.

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JUNE 1998

(City Council testimony "revealed that street gangs are responsible for a variety of criminal activity, including drive-by shootings, drug dealing, and vandalism."). As a result of that threat, anyone standing with a gang member on a street corner—especially someone who is unaware that the group contains gang members—is a potential casualty of stray fire as a result of inter-gang violence. The City has a strong interest in protecting non-gang members from such violence, and the ordinance's requirements that even non-gang members disperse when they are in a group containing gang members assists in achieving that goal.

JUN 19 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1121

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

CITY OF CHICAGO,
Petitioner,

v.

JESUS MORALES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. REPRESENTATIVES HENRY HYDE AND LUIS V. GUTIERREZ, ALLIED EDUCATIONAL FOUNDATION, NORTHWEST NEIGHBORHOOD FEDERATION, AND WEST AVALON CIVIC GROUP, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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27 pp

QUESTION PRESENTED

Amici curiae address the following question only:

Whether, despite legislative findings about the deleterious effects of loitering by criminal street gangs, an ordinance that requires a group of loiterers containing criminal street gang members to obey a police order to move on violates substantive due process guarantees.

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INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation in a wide variety of areas, WLF devotes a substantial portion of its resources to criminal justice reform and crime prevention efforts. To that end, WLF has appeared before this Court as well as other federal and state courts to support government efforts to ensure that law-abiding citizens can

feel safe while walking down neighborhood streets. *See, e.g., People ex rel. Gallo v. Acuna,* 14 Cal. 4th 1090, *cert. denied,* 117 S. Ct. 2513 (1997); *Northern Virginia Chapter, American Civil Liberties Union v. City of Alexandria,* 747 F. Supp. 324 (E.D. Va. 1990). WLF also filed briefs in this case in support of Petitioner in both the Supreme Court of Illinois and the Appellate Court of Illinois.[1]

Reps. Henry J. Hyde and Luis V. Gutierrez are Members of the U.S. House of Representatives, representing Illinois's 6th and 4th Districts, respectively. Rep. Hyde is Chairman of the House Judiciary Committee. Reps. Hyde and Gutierrez support the City of Chicago's efforts to control escalating gang-related problems through passage of its gang loitering ordinance.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

The Northwest Neighborhood Federation (NNF) is a coalition of community groups located on Chicago's northwest side. The NNF coalition includes the following groups: Belmont-Irving Organization; Kelvyn-Wel Community Organization; Avondale Community Team;

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief, in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

Cragin Community Association; Belmont Austin Concerned Neighbors; West Cragin Neighbors; Hanson-Riis Park Neighborhood Association; and North Avondale Organization. The NNF has received petitions from over 10,000 residents of the northwest side of Chicago who are in favor of taking action to curb criminal street gang activity in their neighborhoods.

The West Avalon Civic Group is a non-profit community association founded in 1972. It is 95% comprised of senior citizens residing in an area of Chicago bounded by 79th Street, 87th Street, Cottage Grove Avenue, and Dobson Avenue.

Amici's constituents and/or members include many individuals who are adversely affected by the gang loitering activities giving rise to the challenged ordinance. *Amici* believe that while the ordinance was being enforced, it significantly improved the quality of life for large numbers of Chicago residents, by demonstrating to them that the City was unwilling to cede control of public streets to criminal gangs.

While *amici* believe that the Ordinance is sufficiently clear in defining proscribed conduct to withstand a void-for-vagueness challenge, *amici* do not address that issue. Rather, this brief focuses on the substantive due process issue; *amici* believe that nothing in the Ordinance so offends liberty interests deeply rooted in our nation's history as to permit a finding that the ordinance violates substantive due process rights.

Amici submit this brief in support of Petitioner with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby incorporate by reference the Statement contained in Petitioner's brief.

In brief, the Chicago City Council on June 17, 1992 adopted an ordinance (the "Ordinance") authorizing police officers to order any group of persons to disburse if the officer reasonably believed that the group contained a member of a criminal street gang. *See* Municipal Code of Chicago, Illinois § 8-4-015 (1992); Petition Appendix ("Pet. App.") 60a-63a. Failure to obey such an order is a criminal offense, punishable by a fine of up to $500 or imprisonment up to six months or both. *Id.* at 63a.

The Ordinance was adopted following hearings on May 15 and 18, 1992, before the Committee on Police and Fire of the City Council of Chicago. Numerous Chicago citizens testified at those hearings that the quality of life in their neighborhoods had deteriorated significantly as a result of increased street gang activity. In particular, citizens testified that gang members, in an effort to claim neighborhoods as their turf, loiter on the streets in those neighborhoods at all hours of the day and night while conducting their illegal gang activities. The record before the City Council showed that results of such loitering are the intimidation of law-abiding passers-by, the solicitation of local children to enlist as gang members, the sale of drugs, the confinement of frightened residents to their homes, the disruption of local businesses, and frequent instances of violence.

A frequently expressed complaint was that neighborhood residents felt that both they and the police

were powerless to "take back" their neighborhoods from these gangs. As Laura Cella, a member of *amicus curiae* NNF, explained to the City Council in describing the activities of the Latin Kings street gang:

> On any given night 30 or 40 gang members hung out at the intersection blocking traffic, throwing gang signs, intimidating residents and, in general, just disrupting life in the entire community. Once the gang established the street as their own, they were free to conduct business openly and without fear of the law. . . . [P]olice never saw it because the gang members have their own scanners. The police would show up. They would see a group of hoods hanging out, but they weren't showing signs, blocking traffic, or selling drugs. Drugs were hidden. They hid everything and stopped their blatant gang activity, and the police would have to leave because there was absolutely nothing they could do.

Tr. of May 15, 1992 hearing, Supp. Record I at 50-51.

Another resident expressed similar sentiments of helplessness in the face of gang intimidation:

> I fought in the Vietnam War. I was a fireman. I was an auxiliary policeman. I have never had the terror that I feel every day when I walk down the streets of Chicago. . . When I call the police, the police come to my house and it points me out. I have had my windows broken out. I have had guns pulled on me. I have been threatened. I get intimidated on a daily basis, and it's come to the point where I say, "Well, do I go out today?

Id. at 124-125. Those who testified were virtually unanimous that a gang loitering ordinance could be decisive in enhancing the liveability of their neighborhoods. *See, e.g., id.* at 56, 64, 80, 111, 117, 125, 138-139.

The Ordinance was adopted in response to these citizen concerns. The City Council specifically found that "[o]ne of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas" and that "loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity." Pet. App. 60a. The Council determined that adoption of the Ordinance was "necessary to preserve the City's streets and other public places so that the public may use such places without fear." *Id.* at 61a.

The Ordinance provides:

> Whenever a police officer observes a person who he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

Municipal Code of Chicago, § 8-4-015(a); Pet. App. 61a.

The Ordinance creates an "affirmative defense" for those who can demonstrate that "no person who was observed loitering was in fact a member of a criminal street gang" (§ 8-4-015(b); Pet. App. 61a), and defines in detail

each of the terms used in § 8-4-015(a). Pet. App 61a-63a. The Chicago Police Department later released Police Department General Order 92-4, which provided even more guidance to officers regarding the circumstances under which the Ordinance should be invoked.

Chicago police subsequently made arrests under the Ordinance on numerous occasions. Trials in the Circuit Court reached conflicting results regarding the constitutionality of the Ordinance. On December 18, 1995, the Appellate Court of Illinois -- in the initial test of the Ordinance to reach an appellate court -- ruled that the Ordinance violated both the United States and Illinois Constitutions. Pet. App. 20a-36a. The appeals court held that the Ordinance violated constitutionally protected "freedoms of association, assembly and expression," was "unconstitutionally vague," "unconstitutionally criminalizes status," and allowed arrests without probable cause in violation of the Fourth Amendment. *Id.* at 21a. Later Ordinance cases to reach the appeals court were similarly dismissed, on the strength of the initial December 1995 decision. *Id.* at 37a-40a.

The Supreme Court of Illinois agreed to hear appeals from each of the appeals court dismissals. On October 17, 1997, the Supreme Court affirmed. *Id.* at 1a-19a. The court cited two grounds for striking down the Ordinance. First, the court held that the Ordinance was void for vagueness, both because it failed to provide adequate notice of proscribed conduct and because it failed to "discourage arbitrary or discriminatory enforcement." *Id.* at 6a-17a. Second, the Court held that the Ordinance violates "substantive due process" because it is "an arbitrary restriction on personal liberty." *Id.* at 17a-19a.

The Court granted Petitioner's petition for review on April 20, 1998. The petition raises two separate issues -- whether the Ordinance is void for vagueness under the Due Process Clause of the 14th Amendment, and whether the Ordinance violates rights/liberties substantively protected by the Due Process Clause. This brief addresses only the second of those two issues.

SUMMARY OF ARGUMENT

The Due Process Clause protects a limited number of "liberty" interests thought to be so fundamental that the government may not deprive individuals of those interests regardless of the fairness of the process employed by the government. But this Court has been very reluctant to expand this concept of substantive due process because there are so few "guideposts" that can assist the Court in making those types of considerations. Accordingly, the Court has limited recognition of substantive due process rights to those areas which "are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksburg,* 117 S. Ct. 2258, 2267-2268 (1997).

Under that standard, the right to loiter claimed by Respondents is not entitled to substantive due process protection. Anti-loitering statutes have been enforced throughout England and America for the past 600 years. Moreover, the primary motivation for such laws has been crime prevention, precisely the motivation behind Chicago's Ordinance. While certain aspects of older vagrancy statutes (particularly provisions restricting citizens' right to travel) are no longer considered constitutionally acceptable, this Court has never questioned the right of government to use such statutes to fight crime.

When (as here) a challenged state action does not implicate any fundamental rights, the action passes muster under the Due Process Clause so long as it bears a reasonable relation to a legitimate state interest. The Ordinance easily meets that test.

ARGUMENT

I. LOITERING IS NOT ONE OF THE LIBERTY INTERESTS SPECIALLY PROTECTED BY THE DUE PROCESS CLAUSE

A. An Activity Is Not Entitled to Special Protection Under the Due Process Clause Unless Such Protection Is Deeply Rooted in the Nation's History and Tradition

The primary focus of the Due Process Clause of the 14th Amendment is procedural fairness; a fair process must be employed before our government may deprive anyone of life, liberty, or property. It is nonetheless now well settled that the Due Process Clause has a substantive component as well; certain "liberty" interests are thought to be so fundamental that the government may not deprive individuals of those interests regardless of the fairness of the process employed by the government. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923)(the right to direct the education and upbringing of one's children).

In striking down the Ordinance, the Illinois Supreme Court invoked this substantive aspect of due process. The court held that "the acts of loafing, loitering, and nightwalking" are "amenities of American life," and that "[t]he freedom to engage in such harmless activities is an aspect of the personal liberties protected by the due process

clause." Pet. App. 17a. The sole U.S. Supreme Court decision cited by the court in support of its conclusion was *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972).

The Illinois court's reliance on *Papachristou* was misplaced. The Court in that case struck down a Jacksonville, Florida vagrancy ordinance on void-for-vagueness grounds. *Id.* at 162. While the Court in *dictum* went on to discuss in general terms the propriety of vagrancy laws, that discussion played no part in the Court's holding. *Id.* at 163-164. In particular, *Papachristou* contains no discussion regarding how one goes about determining the scope of the Due Process Clause's substantive protections.

Subsequent Court decisions have provided detailed guidance regarding when an activity is entitled to substantive due process protection. The contours of substantive due process are to be drawn "from careful 'respect for the teachings of history [and], solid recognition of the basic values that underlie our society.'" *Moore v. City of East Cleveland,* 431 U.S. 494, 503 (1977)(plurality opinion) (quoting *Griswold v. Connecticut,* 381 U.S. 479, 501 (Harlan, J., concurring)). Substantive due process "specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg,* 117 S. Ct. 2258, 2268 (1997)(quoting *Moore,* 431 U.S. at 503 (plurality opinion)). Thus, the Court in *Moore* stated that "the sanctity of the family" is entitled to substantive due process protection:

> precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

Id. at 503-504 (plurality opinion).

The Court has held that the "liberty" interests specially protected under the Due Process Clause include -- in addition to the specific freedoms protected by the Bill of Rights -- such rights as the right to marry (*Loving v. Virginia,* 388 U.S. [illegible]67)), the right to use contraceptives (*Griswold*), and the right to an abortion (*Planned Parenthood v. Casey,* 505 U.S. 833 (1992)).

But the Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Collins v. Harker Heights,* 503 U.S. 115, 125 (1992). The Court has explained that reluctance as follows:

> By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court, *Moore,* 431 U.S., at 502 (plurality opinion).

Glucksberg, 117 U.S. at 2267-2268. Limiting the recognition of substantive due process rights to those areas which "are, objectively, deeply rooted in this Nation's history and tradition" serves to provide "crucial guideposts for

responsible decisionmaking" that "direct and restrain [the Court's] exposition of the Due Process Clause." *Id.* at 2268.

The Illinois Supreme Court failed to undertake such a historical analysis before determining that "the acts of loafing, loitering, and nightwalking" are "an aspect of the personal liberties protected by the due process clause." Pet. App. 17a. Historical analysis reveals that anti-loitering laws such as the Ordinance have long been accepted under English and American tradition, and that loitering -- defined here as "remain[ing] in any one place for no apparent purpose" -- has never been accepted in this country as a fundamental right or liberty interest.

B. The Alleged "Right to Loiter" Is Not a Right So Rooted in the American Experience As to Be Deemed a Fundamental Right

Vagrancy and anti-loitering statutes have been a fixture of Anglo-American law since at least the Fourteenth Century. Commentators have, from time-to-time, ascribed economic motives to vagrancy laws (a broader category, of which anti-loitering laws are a subset). For example, the Statutes of Labourers of 1349-1350, which attempted to restrict the free movement along public ways of laborers seeking employment, have been characterized by some as an effort to hold down wages in an era of labor shortage following the Black Death. *See, e.g.*, William J. Chambliss, *A Sociological Analysis of the Law of Vagrancy,* 12 SOCIAL PROBLEMS 67, 69 (1964) [hereinafter, "Chambliss"]. Similarly, vagrancy laws were utilized in Elizabethan England to restrict movement of paupers who, it was feared, might be a drain on the resources of local communities that had begun organized relief efforts on

behalf of local poor people. *See, e.g.*, Mark Malone, *Homelessness in a Modern Urban Setting,* 10 FORDHAM URBAN L.J. 749, 755-756 n.19 (1982) [hereinafter "Malone"].

However, historians are in general agreement that vagrancy and anti-loitering laws have over the centuries been motivated primarily by a desire to control crime. Malone, *supra,* 758-759; Jeffrey S. Adler, *A Historical Analysis of The Law of Vagrancy,* 27 CRIMINOLOGY 209, 212 (1989). The Court in *Papachristou* emphasized the crime-prevention purpose underlying the creation of vagrancy and anti-loitering laws. *Papachristou,* 405 U.S. at 161 n.4 ("the notorious 'brotherhood of beggars' which flourished in the 16th and 17th centuries . . . were a definite and serious menace to the community and it was chiefly against them and their kind that the harsher provisions of the vagrancy laws of the period were directed").

English vagrancy laws were reproduced in colonial America as crime-prevention measures. Chambliss, *supra,* at 75-77; Malone, *supra,* at 755-756. Able-bodied individuals who spent their time idly were (not surprisingly) considered the most likely suspects for crimes that were disrupting the community; vagrancy and anti-loitering laws were used to reduce the level of disruptive activity. *Id.* at 758-59.

Amici do not understand Respondents to seriously challenge the proposition that anti-loitering laws have been in widespread use throughout our nation's history. Rather, their argument appears to be that times have changed, and that what were once accepted as permissible crime-

prevention measures are no longer permissible in a "modern" society.

But any such argument is contrary to established case law regarding recognition of substantive due process rights. "The acts of loafing, loitering, and nightwalking" (Pet. App. 17a) can hardly be said to be fundamental rights "deeply rooted in this Nation's history" (*Glucksburg*, 117 S. Ct. at 2268), given that they have been subject to significant abridgement throughout American history, up to and including the present day.[2] Recent lower-court decisions that have struck down anti-loitering ordinances on substantive due process grounds generally have done so by reference to *dictum* in *Papachristou* rather than based on any claim that loitering has traditionally been deemed a fundamental right in this country.

Amici do not mean to suggest that all aspects of medieval vagrancy law conform to the American understanding of ordered liberty. Indeed, even as many states maintained on their statute books broad vagrancy

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[2] State anti-loitering statutes currently in force include the following: ALA. CODE § 13A-11-9 (1975); ARIZ. REV. STAT. ANN. § 13-2905 (1988); ARK. CODE ANN. § 5-71-213 (Michie 1995); CAL. HEALTH & SAFETY CODE § 11532 (West 1995); COLO. REV. STAT. ANN. § 18-9-112 (West 1997); DEL. CODE ANN. tit. 11, § 1321 (1998); FLA. STAT. ANN. § 856.021 (West 1997); GA. CODE ANN. § 16-11-36 (1980); HAW. REV. STAT. S 712-1206 (1991); KY. REV. STAT. ANN. § 525.090 (Michie/Bobbs Merrill 1994); LA. REV. STAT. ANN. § 14:107 (West 1968); MINN. STAT. ANN. § 609.725 (West 1986); N.H. REV. STAT. ANN. § 644:6 (1996); N.Y. PENAL LAW § 240.35 (McKinney 1979). Many cities, towns, and counties enforce similar anti-loitering ordinances.

laws that sought to restrict the right of paupers to travel freely, the nation developed a strong tradition of permitting unrestricted travel among the several states. As Justice Cardozo once noted:

> The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed under the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

Baldwin v. Seelig, 294 U.S. 511 (1934). This Court had recognized by the mid-19th Century that "the right to move freely from state to state was a right of *national* citizenship." *Edwards v. California*, 314 U.S. 160, 179 (1941)(Douglas, J. concurring)(emphasis in original); *see also id.* at 184 (Jackson, J., concurring).

These competing strands of American tradition co-existed uneasily. The desire of states to avoid the financial burden of caring for paupers led to the exclusion of "paupers" and "vagabonds" from the Privileges and Immunities Clause contained in the Articles of Confederation. This Court on several occasions affirmed the right of states to exclude paupers from their midst, most famously in *City of New York v. Miln*, 36 U.S. (11 Pet.) 102, 142-143 (1837)(it is "as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against the physical pestilence."). On the other hand, the Court held that the "fundamental" right of citizens to travel freely throughout the nation was violated by a Nevada tax imposed on those

leaving the state by common carrier. *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867).

The Court ultimately resolved this tension in *Edwards* by explicitly extending to all citizens the right to travel freely, without regard to wealth. *Edwards*, 314 U.S. at 177 (invoking Commerce Clause to invalidate California law prohibiting the bringing of indigents into the state). The Court concluded that California lacked a rational basis for excluding indigents because "[p]overty and immorality are not synonymous," and because "the relief of the needy has become the common responsibility and concern of the whole nation." *Id.* at 177, 175.

The Court recognized the lengthy tradition in English and American history which held "that each community should care for its own indigent, that relief is solely the responsibility of local government." *Id.* at 174. The Court concluded, however, that times had changed and that the tradition of local relief efforts had been supplanted by federal and state assumption of those tasks. *Id.* at 174-175. Because "the theory of the Elizabethan poor laws [i.e., that relief is solely the responsibility of local government] no longer fits the facts," that theory could not be invoked to justify imposing travel restrictions on indigents. *Id.* *See also, Shapiro v. Thompson*, 394 U.S. 618 (1968)(the right to travel is a right protected by the Due Process Clause, and states violate that right by denying welfare benefits to indigents newly arrived from other states).

In sum, it is now well settled that substantive due process protects the right of all citizens to move freely within the country, notwithstanding past efforts to use the vagrancy laws to restrict the movement of indigents. It should be noted, however, that those aspects of vagrancy

laws no longer deemed constitutionally acceptable had an *economic* rationale (e.g., the desire of a community to avoid increased welfare payments by excluding paupers). The Court has never invoked substantive due process to invalidate those aspects of vagrancy and anti-loitering laws whose primary rationale is to reduce crime. Moreover, it is not accurate to view anti-loitering laws such as the Ordinance as imposing any restrictions on the movement of citizens; the purpose of such laws is quite the opposite -- to prevent individuals from "remain[ing] in one place with no apparent purpose" (Pet. App. 61a) under circumstances suggesting that undesirable activity is taking place.

In support of its decision to expand substantive due process protections to "the acts of loafing, loitering, and nightwalking," the Illinois Supreme Court stated that such activities are "harmless." Pet. App. 17a. *Amici* respectfully submit that that is the type of judgment that no court should be attempting to make. The City of Chicago and many of its citizens have determined that loitering on city streets under the circumstances described in the Ordinance is extremely harmful to the quality of life in the city. In the absence of evidence that the "right" to loiter is a right "deeply rooted in this Nation's history and tradition," the courts are ill-equipped to overrule the democratically elected branches of government on this point.

Papachristou makes the valid point that most people who loiter or engage in nightwalking do not get arrested for doing so. The Court said, "The Jacksonville ordinance makes criminal activities which by modern standards are normally innocent." *Papachristou*, 405 U.S. at 163. But that statement was written in connection with the Court's consideration of a void-for-vagueness challenge to

Jacksonville's vagrancy statute. A statute is void for vagueness if, *inter alia,* it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" (*id.* at 162); fair notice is of particular concern when a statute criminalizes activities that the average citizen might consider to be "innocent" behavior. But the Court's reference to "normally innocent" activities should not be read as prohibiting governments from determining that such activities under some circumstances can undermine public order and thus should be criminalized.[3]

Although *Papachristou* was decided on void-for-vagueness grounds, *dictum* in the opinion suggests that the Jacksonville vagrancy ordinance at issue there also violated substantive due process rights. The Court said:

> The difficulty is that these activities [prohibited under the ordinance, including wandering, strolling, loitering, and loafing] are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-

[3] Moreover, absence of "fair warning" is not a legitimate concern under the Ordinance, because no one can be arrested pursuant to the Ordinance unless he disobeys an order to disperse. Ordinance, § 8-4-015(a). Indeed, in *Shuttlesworth v. City of Birmingham,* 382 U.S. 87 (1965), the Court stated in *dictum* that an anti-loitering ordinance was *not* facially void for vagueness where it provided for arrest of those who obstructed the free passage of streets or sidewalks *and* refused to obey a police order to move on. *Shuttlesworth,* 382 U.S. at 91.

> confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encourage lives of high spirits rather than hushed, suffocating silence.

Id. at 164.

Were the Court to extend substantive due process protection to all the "unwritten amenities" of life cited in *Papachristou,* that doctrine would expand far beyond the "guideposts for responsible decisionmaking" referenced in *Collins* and *Glucksburg*. Moreover, while many people would concede that "loitering" quietly by oneself in front of one's own house constitutes "innocent" behavior, most would challenge that description if one loiters with a criminal street gang in a manner that intimidates passers-by. Given the infinite variety of circumstances under which one might experience the amenities of life described in *Papachristou,* courts should not place themselves in the position of second-guessing legislative determinations that some of those circumstances should not be deemed "innocent."

Amici note finally that the passage from *Papachristou* quoted above makes reference to "the right of dissent" and other expressive activities. Such expressive activities are, of course, often entitled to First Amendment protection. But there is nothing expressive about the activities made criminal under the Ordinance: "loitering" is the only activity prohibited under the Ordinance, and it can hardly be considered an "expressive" activity given that it is defined as "remain[ing] in any one place with no apparent purpose." Ordinance, § 8-4-015(a). Nor can the

Ordinance be said to interfere with the First Amendment right to associate with others. The Court has made clear that the First Amendment right to associate extends only to associations with a substantial expressive purpose; a mere desire to meet and talk with friends is insufficient. *City of Dallas v. Stanglin,* 490 U.S. 19 (1990).

II. THE ORDINANCE IS REASONABLY RELATED TO A LEGITIMATE STATE INTEREST

When (as here) a challenged state action does not implicate any fundamental rights, the action passes muster under the Due Process Clause so long as it bears "a reasonable relation to a legitimate state interest." *Glucksburg,* 117 S. Ct. 2268. The Ordinance easily meets that test.

Prior to adopting the ordinance, the Chicago City Council had before it considerable evidence that life in many city neighborhoods had deteriorated significantly as a result of increased street gang activity. In particular, by loitering on neighborhood streets at all hours of the day and night while conducting illegal gang activities, gang members were intimidating law-abiding passers-by, disrupting local businesses, and effectively confining frightened residents to their homes.

The Ordinance was adopted for the purpose of addressing those concerns. By preventing gang members from loitering on city streets, Chicago can make its streets accessible once again to law-abiding citizens and can decrease the opportunity for gang members to engage in illegal activities. Numerous citizens have attested to the effectiveness of the Ordinance while it was being enforced. But even if the Ordinance had not proven effective, there

was at least a reasonable basis for believing that it might -- and thus the Ordinance bears a reasonable relation to Chicago's goal of improving the city's quality of life.

Dictum in *Papachristou* suggests that vagrancy and anti-loitering laws are illegitimate because their real purpose is to incarcerate those suspected of having committed, or of being likely to commit a crime -- but against whom the police have insufficient evidence to obtain a conviction. *Papachristou,* 405 U.S. at 169-171. But the Court in *Papachristou* seemed most concerned by the danger that vagrancy laws were being enforced in a discriminatory manner against the poor and racial minorities. *Id.* Assuming that the provisions of a loitering statute are sufficiently clear to channel police officers' discretion regarding against whom to bring charges, vagueness problems are eliminated and the dangers of discriminatory enforcement are reduced. Nor should the Ordinance be viewed as a back-handed way of incarcerating gang members whom police believe (but cannot prove) committed other crimes. Chicago has a reasonable basis for concluding that it is the gang-member loitering itself (not simply the unproven crimes) that is causing the deterioration of neighborhoods; that conclusion is sufficient justification for Chicago's decision to criminalize loitering in limited circumstances.

CONCLUSION

Amici curiae Washington Legal Foundation, *et al.*, respectfully request that the judgment of the Supreme Court of Illinois be reversed.

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QUESTIONS PRESENTED

1. Whether the right to loiter on public streets with members of a criminal street gang is one of the traditional "amenities of American life" that, under principles of "substantive due process," may not be abridged by a police order to disperse.

2. Whether an ordinance that (i) specifically defines "loitering" and "criminal street gangs," (ii) authorizes police to order the dispersal of a group of loiterers when there is probable cause to believe that members of criminal street gangs are among the group, and (iii) permits the arrest of those loiterers who disobey the order to disperse, is so lacking in clarity that it is void for vagueness in all of its applications.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling interest in the issues presented in this case: (1) the extent to which courts can invoke "substantive due process" to place particular classes of conduct beyond the reach of the criminal laws, and (2) the standards the courts must

apply in assessing whether criminal laws are "vague" or "overbroad." Those issues arise in this case in the context of a facial challenge to the ability of state and local governments to enact legislation outlawing loitering on public streets, where, as here, such loitering substantially furthers the nefarious activities of criminal street gangs. *Amici* believe that properly drawn loitering laws are an essential law enforcement tool that significantly contributes to reduce criminal activity and to improve the quality of life enjoyed by law-abiding citizens, particularly in urban environments. *Amici* therefore submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT

1. Recent years have seen a dramatic change in the way many big-city police departments respond to criminal behavior. Rather than focusing solely on solving serious crimes that already have occurred, police increasingly take measures to prevent crime before it happens. Police intervention in relatively small-scale disorder—for example, preventing rowdy, drunken and antisocial behavior; eradicating graffiti, litter and vandalism; and enforcing curfew, cruising and loitering laws—has been shown to make neighborhoods safer places and to reduce the incidence of more serious criminal activity. *See* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va. L. Rev. 349, 367-69 (1997) (recounting the experience of New York City, where more active enforcement of quality-of-life offenses, such as vandalism, panhandling and prostitution, contributed to a steep decline in the rates of murder, robbery and other serious crimes).

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The increasingly prevalent strategy of using police to maintain order in urban communities, in addition to the traditional police role of solving serious crimes, generally is referred to as "community policing." *See* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551, 573-78 (1997). A principal impetus for the community policing movement is the common-sense notion that there is less crime in orderly neighborhoods. As a leading article explained, "if a window in a building is broken and left unrepaired, all the rest of the windows will soon be broken. . . . [O]ne unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing." James Q. Wilson & George L. Kelling, *Broken Windows*, The Atlantic Monthly, Mar. 1982 at 29, 31 (emphasis omitted). Signs of disorder in public streets—*e.g.*, broken windows, litter, drunks or drug addicts slumped on the sidewalk, or loitering gang members—cause the law-abiding public to avoid public rights of way and thus severely dilute the kinds of informal social checks that traditionally have permitted all of us to look after each other and to keep our streets safer. "[I]t is more likely that here, rather than in places where people are confident they can regulate public behavior by informal controls, drugs will change hands, prostitutes will solicit, and cars will be stripped." *Id.* at 32.

2. In 1992, the Chicago City Council held extensive hearings on the vexing public-safety problems posed for that city's residents by criminal street gangs. After extensive testimony from law enforcement officers and from community residents who lived under the terror created by those gangs, the City Council found that "the continuing increase in criminal street gang activity in the City [was] largely responsible" for an "increasing murder rate as well as an increase in violent and drug related crimes," and that "the burgeoning presence of street gang mem-

bers in public places has intimidated many law abiding citizens." Pet. App. 60a.

The City Council specifically found that, apart from "creat[ing] a justifiable fear for the safety of persons and property in the area" (Pet. App. 60a), loitering involving members of criminal street gangs furthered the gangs' criminal activities in two important and distinct ways. First, gang members "avoid arrest" for their street crimes by eschewing overt criminality and simply loitering "when they know the police are present." *Ibid.* Second, loitering is indispensable to the notion of gang "turf"—*i.e.*, the assertion by a particular criminal gang of the right to *control* a given area of the City to the detriment of competing gangs and the members of the law-abiding public—because "[o]ne of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas." *Ibid.*

In view of those findings, the City Council adopted an ordinance authorizing police officers to order gang members who are loitering in public areas (or those loitering with them) to disperse, and to arrest those who refuse to do so:

> Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

Pet. App. 61a. The ordinance carefully defined each of its operative terms. The phrase "criminal street gang" was defined to require, among other things, an association-in-fact or organization engaged in a pattern of specifically identified state crimes, *id.* at 61a-62a, thus tracking the definitions of "enterprise" and "racketeering" widely used in federal and state statutes that address the problems posed by organized crime. *See* 18 U.S.C. § 1961; *United States v. Turkette*, 452 U.S. 576 (1981). The term "loiter" was defined as "remain[ing] in any one place with no apparent purpose." Pet. App. 61a. The ordinance further provided that criminal liability may *not* be imposed if the defendant establishes, as an affirmative defense, "that no person who was observed loitering was in fact a member of a criminal street gang." *Ibid.*

In addition, the Chicago Police Department adopted detailed guidelines governing the enforcement of the gang-loitering ordinance. The ordinance was to be enforced only in "areas frequented by members of criminal street gangs which, because of their location, significantly affect the activities of law-abiding persons in the surrounding community." Pet. App. 68a. The guidelines require "probable cause" to believe that a particular individual is a member of a criminal street gang, and provide detailed objective criteria for assessing the existence of probable cause. *Id.* at 67a-68a, 71a-72a. Those criteria include the gang members' admissions, distinctive gang "colors" or tattoos, and statements by informants of proven reliability. *Ibid.*

3. Respondents were separately arrested for disobeying a police order to disperse or "move along" under Chicago's gang-loitering ordinance and challenged the validity of the ordinance on numerous constitutional grounds. After separate proceedings in the lower state courts, the Supreme Court of Illinois consolidated respondents' challenges and agreed with respondents that the ordinance violates the federal Constitution.

The court first concluded that the ordinance is void for vagueness. Pet. App. 6a-17a. The court explained that, even though the term "loiter" is specifically defined by the ordinance as "remain[ing] in one place with no apparent purpose," the term fails to give persons of ordinary intelligence sufficient notice of what is pro-

hibited because "[p]eople with entirely legitimate and lawful purposes will not always be able to make their purposes apparent to an observing police officer." *Id.* at 10a. That infirmity was not cured, in the court's view, by the requirement that the officer have probable cause to believe that one of the loiterers is a gang member, by the fact that it is a legal defense under the ordinance that no member of the group was in fact a gang member, or by the fact that prosecution is possible only if the defendant disobeys a clear order to disperse. As the court saw it, the City may not criminalize even a defendant's *knowing* participation in, or association with, criminal street gangs (*id.* at 12a), and it may not confer on police the authority to disperse loiterers "if the underlying statute is itself impermissibly vague." *Id.* at 13a.

The court also concluded that the purported "vagueness" of the ordinance improperly encouraged "arbitrary and discriminatory enforcement." Pet. App. 14a. In this connection, the court was especially critical of the Chicago Police Department's effort to set forth specific written guidelines for enforcing the ordinance, a step that the court conceded was contemplated by the City Council, because in the court's view "lawmakers may not abdicate their responsibilities for setting the standards of the criminal law." *Id.* at 15a.

Finally, the court held that Chicago's ordinance "is an arbitrary exercise of the city's police power and, thus, violates substantive due process." Pet. App. 17a. The court believed that its conclusion was compelled by *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), which, in the court's view, stood for the proposition that the type of loitering prohibited by the ordinance is one of the traditional "amenities of American life." Pet. App. 17a (citing *Papachristou*, 405 U.S. at 164). The "amenities" invaded by the Chicago ordinance, in the court's view, included "the general right to travel, the right of locomotion, the right to freedom of movement, and the

general right to associate with others." *Id.* at 18a (citations omitted).

In light of its conclusion that the gang loitering ordinance violates substantive due process, the court found it unnecessary to examine respondents' more specific claims under the First, Fourth, and Eighth Amendments. Pet. App. 5a, 19a.

SUMMARY OF ARGUMENT

A. The Supreme Court of Illinois clearly erred in concluding that Chicago's ordinance is an "arbitrary" restriction on "general right[s]" of "locomotion," "movement," "associat[ion] with others" and "travel" that are protected by "substantive due process." This Court's cases make clear that substantive due process is a residual doctrine, and that any analysis of such a substantive right must begin with careful identification of the constitutional sources of the protection being claimed. Indeed, a long line of cases exemplified by *Graham v. Connor*, 490 U.S. 386 (1989), holds that courts should *first* examine such claims under any applicable provisions of the Bill of Rights, and should not invoke "substantive due process" to circumvent the balance of societal and individual interests reflected in those Amendments. Because substantive due process is a *residual* doctrine, any recognition of substantive rights beyond those enumerated in the Bill of Rights carries a heavy burden of justification. Moreover, in order to maintain "the constitutional proportions" of due process (*County of Sacramento v. Lewis*, No. 96-1337, slip op. at 16 (U.S. May 26, 1998)), the standards applicable to any residual due process right that the Court *does* recognize must be tailored to mesh with related areas of constitutional law, and not subject legislators, courts, and police to inconsistent standards of conduct.

The decision of the Supreme Court of Illinois cannot be reconciled with those principles. That court got the analy-

sis exactly backwards by grounding its decision on "substantive due process" while at the same time declining to address respondents' claims under the First, Fourth, and Eighth Amendments. The correct analysis of those provisions of the Bill of Rights shows that respondents' conduct is unprotected by them. Respondents enjoy no First Amendment right to engage in non-expressive association, and any expressive conduct in which they might engage on public streets may permissibly be regulated, as the ordinance does, as to its time, place and manner. Because an order to disperse does not effect a "seizure," and the officer's conduct under the ordinance is in any event always justified by probable cause, respondents have no meritorious claim under the Fourth Amendment either. And respondents' contention that the ordinance creates a "status" offense forbidden by the Eighth Amendment is also foreclosed by this Court's cases. In view of that analysis, respondents cannot carry the heavy burden of demonstrating that any residual liberty interest in remaining on a public street "for no apparent purpose" is not similarly subject to reasonable state legislation under the police power.

B. The Supreme Court of Illinois also erred in its analysis of the ordinance's purported "vagueness." That court misperceived the proper role of vagueness doctrine, mistakenly using it as a source of authority for substantive review of the legislative policies reflected in the ordinance, rather than merely as a vehicle for ensuring clarity and fair notice of what is prohibited. The court also mistakenly believed that the breadth of a statute is grounds for its invalidation. Overbreadth is a distinct constitutional doctrine that is triggered only by a determination that a law reaches a *substantial* amount of expressive conduct protected by the First Amendment. Since the Chicago ordinance displays no infirmity under the First Amendment, much less reach a substantial amount of protected conduct, the Illinois court clearly erred in relying

on the purported breadth of the ordinance as a basis for its invalidation.

ARGUMENT

CHICAGO'S GANG LOITERING ORDINANCE IS CONSTITUTIONAL

Respondents' challenge to Chicago's gang loitering ordinance was predicated on its purported invalidity under the First, Fourth and Eighth Amendments, and on its alleged failure to supply the type of clear notice of the criminality of one's conduct that due process requires. The Supreme Court of Illinois refused to address respondents' claims under the Bill of Rights, concluding instead that the principles of "substantive due process" that inform the void-for-vagueness doctrine not only speak to the *clarity* of legislation, but also give courts broad authority to give *greater* relief to persons in respondents' position than the Bill of Rights would require in the circumstances.

The court's analysis resulted in the invalidation of an ordinance that addresses a compelling social problem with undoubted clarity, and which displays no constitutional infirmity under any conceivably applicable provision of the Bill of Rights. The basis for the court's holding was its conclusion that the right to loiter with members of criminal street gangs is an "amenit[y] of American life" protected by "substantive due process." Pet. App. 17a-18a. That surprising conclusion resulted directly from the court's failure to follow (or even acknowledge) the analytical framework that this Court has prescribed for "substantive due process" claims. That established framework requires courts to consider a defendant's claims under specific provisions of the Bill of Rights *first*, and permits invocation of substantive due process only residually—to safeguard the concededly few "fundamental" rights that are not already protected by the Bill of Rights. The "right" to loiter on public streets with members of a criminal street gang, notwithstanding a police order to move

along, is neither protected under the Bill of Rights nor so rooted in our Nation's traditions that it must be deemed "fundamental." The Supreme Court of Illinois accordingly erred by invoking the void-for-vagueness doctrine as the source of that "right."

A. Because "Substantive Due Process" Rights Are Inherently Residual, Courts Must Not Recognize Such Rights In Areas Already Addressed By The Bill Of Rights

This Court has repeatedly emphasized the limited substantive reach of the Due Process Clauses of the Fifth and Fourteenth Amendments. *Reno v. Flores*, 507 U.S. 292, 299-301 (1993); *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). "The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (plurality). Needless to say, the "right" to join a criminal gang, or the right to congregate on public streets with members of a criminal gang, bears no resemblance to "those recognized in this group of cases." *Ibid.* Respondents must therefore carry the burden of demonstrating that the asserted "rights" are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Flores*, 507 U.S. at 303 (internal citations omitted); *Medina v. California*, 505 U.S. 437, 445 (1992). Their burden in this respect is particularly high where, as here, they contend that due process immunizes an entire class of conduct from criminal liability, because this Court will not "lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Medina*, 505 U.S. at 445; *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986); *Montana v. Egelhoff*, 518 U.S. 37, 58 (1996) (Ginsburg, J., concurring in judgment). The Supreme Court of Illinois clearly erred in concluding that respondents met that heavy burden.

1. The Supreme Court of Illinois erred at the outset by avoiding respondents' claims under the Bill of Rights, and concentrating instead on substantive due process, with its "scarce and open-ended" guideposts "for responsible decisionmaking." *Collins*, 503 U.S. at 125; *Washington v. Glucksberg*, 117 S. Ct. 2258, 2267-68 (1997). This Court's cases make clear that that mode of analysis put the cart before the proverbial horse. As the Court unanimously noted two Terms ago, "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States v. Lanier*, 117 S. Ct. 1219, 1228 n.7 (1997); *Graham v. Connor*, 490 U.S. 386, 395 (1989) (same); *see also Soldal v. Cook County*, 506 U.S. 56, 70 (1992) (conduct challenged under more than one textual provision of the Constitution must be analyzed under each such provision separately); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49-50 (1993) (same, for Fourth Amendment and procedural due process).

This Court has applied that principle in a number of contexts. In *Graham*, the Court invoked it to hold that substantive due process has no place in analyzing claims that police used "excessive force" during an arrest, which must instead be gauged *solely* under the Fourth Amendment. As the Court put it, "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." 490 U.S. at 395.

The Court reaffirmed that principle in *Albright*, *supra*, which rejected the notion that substantive due process embodies some right to be free from "arbitrary" prosecutions. As the Chief Justice explained, "[i]t was through

[the] provisions of the Bill of Rights that their Framers sought to restrict the exercise of arbitrary authority by the Government in particular situations." 510 U.S. at 273 (plurality of Rehnquist, C.J., joined by O'Connor, Scalia & Ginsburg, JJ.). Thus, the Court concluded, only the specific Amendment that addresses the "particular sort of government behavior," rather than doctrines of substantive due process, should be applied to claims challenging that particular behavior. *Ibid.*; *see also id.* at 281 (Kennedy, J., joined by Thomas, J., concurring in judgment) ("I agree with the plurality that [the] allegation . . . must be analyzed under the Fourth Amendment without reference to more general considerations of due process"). As Justice Souter further noted, the importance of "reserving due process for otherwise homeless substantial claims" is "underscored by pragmatic concerns about subjecting governmental actors to two (potentially inconsistent) standards for the same conduct" and thereby imposing on the lower courts "the unenviable burden of reconciling well-established jurisprudence" under the Bill of Rights "with the ill-defined contours of some novel due process right." *Id.* at 287-88 (Souter, J., concurring in judgment).

The concern highlighted in Justice Souter's *Albright* concurrence—the need for any substantive due process right to mesh doctrinally with cognate provisions of the Bill of Rights—was evidenced in the Court's most recent opinion in this area. In *County of Sacramento v. Lewis*, No. 96-1337 (U.S. May 26, 1998), the Court was asked to decide whether a police officer violates substantive due process rights by recklessly causing a death during a high-speed automobile chase. In addressing that question, the Court first noted that "the rule in *Graham*" is a "threshold issue" that must be addressed before the Court can decide whether a particular allegation of government misconduct "can ever support a due process claim." *Lewis*, No. 96-1337 (slip op.), at 8. The Court then concluded that the particular chase was not "covered" by the Fourth

Amendment, because the plaintiff's freedom of movement was not terminated by an *intentional* use of force. *Id.* at 9; *compare Tennessee v. Garner*, 471 U.S. 1 (1985) (intentional use of deadly force effects a Fourth Amendment seizure). Accordingly, "*Graham*'s more-specific-provision rule" did not bar recognition of a substantive due process right in the circumstances. *Lewis*, No. 96-1337 (slip op.), at 10.

The potential availability of a due process claim did not, however, end the inquiry. As the Court recognized, "concern with preserving the constitutional proportions of substantive due process" required an "exact analysis" of the circumstances that could actually give rise to a violation of the due process right. *Lewis*, No. 96-1337 (slip op.), at 16. That "exact analysis" led the Court to its Eighth Amendment precedents dealing with prison riots as an "analogy * * * [that] would be hard to avoid" (*id.* at 18-19) when assessing the competing safety and law-enforcement considerations that must be balanced by a police officer in deciding whether to give chase. The Court therefore concluded that "[j]ust as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for Due Process liability in a pursuit case." *Id.* at 19.

2. Given that respondents claimed in the courts below that the ordinance not only is "covered by," but in fact violates, the First, Fourth and Eighth Amendments, the Supreme Court of Illinois clearly erred in pretermitting those claims. That is a key error in two different respects. *First*, provisions of the Bill of Rights do indeed speak to the liberties that the court below believed are implicated by the ordinance, but it is quite clear that *nothing* in the Bill of Rights impugns the validity of that ordinance. The court's ruling therefore created "substantive due process" rights that are *broader* than the provisions of the Bill of Rights that speak to the particular questions, effectively circumventing the doctrinal limitations of those provisions.

Because the Bill of Rights speaks to—and does not invalidate—the bulk of the government conduct that the court below found objectionable, its "requirements are not to be supplemented through the device of 'substantive due process.'" *Albright*, 510 U.S. at 276 (Scalia, J., concurring).

Second, the correct doctrinal analysis of the Bill of Rights questions is an essential threshold inquiry because, as *Lewis* demonstrates, the Bill of Rights necessarily informs the *scope* of any residual due process rights that the Court might recognize. That doctrinal analysis therefore avoids the creation of anomalies or inconsistencies in the constitutional rules that govern similar governmental judgments. *Compare United States v. Payner*, 447 U.S. 727, 736 (1980) (courts should not invoke supervisory power to supplement the exclusionary rule, which already reflects society's best judgment of the balance that should be struck between the government's and the suspect's interests). Here, the correct doctrinal analysis under the Bill of Rights not only fails to support respondents' specific challenges to the ordinance, but it also highlights the fact that interests quite a bit weightier than the right "to remain in one place for no apparent purpose," or the right to associate with criminal gangs, have uniformly been held subject to reasonable regulation under the police power. It therefore would be anomalous for any residual due process rights that might exist beyond those provisions of the Bill of Rights to receive the type of absolute protection that the Supreme Court of Illinois accorded them.

3. Chicago's ordinance is fully consistent with the First Amendment. This Court's "public forum" cases recognize that public streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.); *see also Cornelius v. NAACP*, 473

U.S. 788, 800 (1985). The First Amendment restricts, however, only the Government's ability to regulate "expressive" or "communicative" activity in those fora. *See Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The conduct of gang members in remaining in one place "for no apparent purpose" is neither expressive nor communicative. And even if it were, Chicago's ordinance would clearly be a valid "time, place and manner" regulation that is "narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication." *Ibid.*; *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293-99 (1984) (sleeping in public parks, even if intended as expressive conduct to protest plight of the homeless, may be banned as valid "time, place and manner" regulation). Indeed, the interest that supports the ordinance—protecting the community from crime—is far more than "significant." As this Court has noted, it "cannot be doubted" that it is "legitimate and compelling." *Schall v. Martin*, 467 U.S. 253, 264 (1984); *see also DeVeau v. Braisted*, 363 U.S. 144, 155 (1960).[2]

Nor does the ordinance interfere with any associational rights protected by the First Amendment. "The ability and the opportunity to combine with others *to advance one's views* is a powerful practical means of ensuring the perpetuation" of First Amendment freedoms, but "[t]his is not to say * * * that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution." *New York State Club Ass'n v. New York City*, 487 U.S. 1, 13 (1988) (emphasis added). Indeed, the Court has not held that there is a "right of private association for other than expressive or

[2] The ordinance is also supported by the "substantial governmental interest" in "attempting to preserve the quality of urban life," *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-51 (1986), from the blighting influences and other untoward effects of gang loitering.

religious purposes." *Id.* at 20 (Scalia, J., concurring in judgment). Standing on a street corner with members of a criminal street gang "might be described as 'associational' in common parlance," but loitering "simply do[es] not involve the sort of expressive association that the First Amendment has been held to protect." *Dallas v. Stanglin*, 490 U.S. 19, 24 (1989). Rather, the activity proscribed by the ordinance is analogous to "walking down the street or meeting one's friends at a shopping mall"—which this Court has held outside the ambit of First Amendment protections. *Id.* at 25. Just as the Constitution does not recognize a "generalized right of 'social association' that includes chance encounters in dance halls" (*ibid.*), it does not create any right of "criminal association" that includes the right to remain on a street "with *no* apparent purpose" *other* than to associate with a "criminal street gang." [3]

3. The ordinance is also consistent with the Fourth Amendment. The police-citizen interactions contemplated by Chicago's ordinance—an officer's approach coupled with an order to disperse—do not give rise to a "seizure" of any person. A "seizure does not occur simply because a police officer approaches an individual" and engages him in conversation, *Florida v. Bostick*, 501 U.S. 429, 434 (1991), or because the officer chases a person away. *See California v. Hodari D.*, 499 U.S. 621, 627-29 (1991); *Brower v. County of Inyo*, 489 U.S. 593 (1989).

[3] Moreover, even if there existed a generalized First Amendment right to use public streets for non-expressive purposes, such a right would be shared equally by law-abiding members of the public who are *not* gang members. Nothing in the First Amendment would preclude the use of a State's police power to ensure that the intimidation and urban blight that attend loitering by gang members do not effectively oust the law-abiding public from enjoyment of the same First Amendment right. *See Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 776 (1994) ("The freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights").

In any event, even if an officer's order to disperse could be considered a "seizure," Chicago police will issue such an order only "when there is *probable cause* to believe that criminal street gang members are loitering in a designated area." Pet. App. 72a (emphasis added). The existence of probable cause objectively justifies the minimal intrusion on individual liberty that the Chicago ordinance contemplates, and it accordingly constitutes the best guarantee of "evenhanded law enforcement." *Horton v. California*, 496 U.S. 128, 138 (1990); *compare Brown v. Texas*, 443 U.S. 47, 50-53 (1979) (invalidating "stop and identify" statute under the Fourth Amendment, because statute did not require officer to have probable cause or reasonable suspicion). That point was unanimously emphasized by the Court only two years ago, when it rejected the claim that the vehicular traffic laws are so broad and pervasive that they essentially license "the police to single out whomever they wish for a stop." *Whren v. United States*, 517 U.S. 806, 818 (1996). As the Court emphasized in *Whren*, the existence of probable cause is sufficient to justify interference with an individual's freedom of movement, since "the usual rule [is] that probable cause to believe the law has been broken 'outbalances' private interest in avoiding police contact." *Ibid.*

4. Respondents' contentions under the Eighth Amendment are even more implausible. While that amendment does limit the ability of governments to criminalize a person's "status," *Robinson v. California*, 370 U.S. 660, 667 (1977) (noting that "[e]ven one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold"), Chicago's ordinance does not create a "status" offense (Pet. App. 5a) because it requires affirmative volitional *conduct*—loitering, membership in (or association with) a criminal street gang, and disobedience of a police order. *See Powell v. Texas*, 392 U.S. 514, 533 (1968).

* * * *

Because Chicago's ordinance does not violate any of the provisions of the Bill of Rights that safeguard the rights of citizens to remain on a public street without undue police interference—particularly the First and Fourth Amendments—"the more generalized notion of 'substantive due process'" (*Graham*, 490 U.S. at 395) should have little role in assessing the validity of that ordinance. That is particularly true in the absence of any demonstration that *additional* limitations upon governmental action are needed to protect *some* right that is deeply rooted in history and tradition. *See Albright*, 510 U.S. at 287-88 (Souter, J., concurring in judgment). If due process indeed creates "general right[s] to associate with others," to "locomote" or to "move[]" freely (Pet. App. 18a),[4] the preservation of "the constitutional proportions of substantive due process" (*Lewis, supra*, at 16) would require a persuasive basis for imposing greater restrictions on government with respect to those "general" rights than with respect to analogous, but more weighty, First and Fourth Amendment freedoms. The Supreme Court of Illinois did not provide that persuasive explanation.

B. Chicago's Ordinance Provides Fair Notice Of What Is Prohibited, And It Is Neither Vague Nor Overbroad

The only "firmly rooted" due process principle recognized by this Court that relates to respondents' claims here is the requirement of "fair warning" embodied in the void-for-vagueness doctrine. The Supreme Court of Illi-

[4] The Supreme Court of Illinois also adverted to "the general right to travel." Pet. App. 18a. While this Court has recognized a limited constitutional right to interstate travel, "or, more precisely, the right to free interstate migration," *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986); *cf. Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990), it has never suggested that such a right encompasses the "right" to remain on a city street "with no apparent purpose" other than to congregate with criminal street gangs.

nois purported to find support for its conclusion in that doctrine. That court, however, confused vagueness with overbreadth, and it misapplied both doctrines. Neither doctrine supports the court's conclusion that Chicago's ordinance is constitutionally infirm.

1. The vagueness doctrine—like other due process doctrines—does not give the judiciary "a 'chancellor's foot' veto over law enforcement practices of which it [does] not approve." *United States v. Russell*, 411 U.S. 423, 435 (1973). As this Court repeatedly has made clear, the essence of vagueness review is simply the requirement of "fair warning," which centers on the use of "language that the common world will understand[] of what the law intends to do if a certain line is passed." *Lanier*, 117 S. Ct. at 1224 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.)); *see also Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Accordingly "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Lanier*, 117 S. Ct. at 1225; *Cameron v. Johnson*, 390 U.S. 611, 616-17 (1968) (statute that prohibits picketing that "obstructs or unreasonably interfere[s]" with courthouse entrances "clearly and precisely delineates its reach in words of common understanding"). Where, as here, a statute is attacked as vague on its face, the party challenging it bears the "heavy burden" of demonstrating that the law can *never* be applied in a valid manner. *Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *New York State Club Ass'n*, 487 U.S. at 11; *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("the challenger must establish that no set of circumstances exists under which the Act could be valid").

The gang-loitering ordinance easily meets the applicable standards of clarity. It clearly defines membership in a "criminal street gang" by reference to a "pattern" of expressly identified state crimes. *Cf. Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 59 n.7 (1989) (noting that

state RICO statute's "pattern" requirement is "inherently *less* vague" than underlying crimes). The ordinance also clearly informs citizens of the prohibited conduct: "[R]emaining in one place with no apparent purpose" in the company of one or more members of a "[c]riminal street gang." Pet. App. 61a. Ordinary people are perfectly capable of understanding what the ordinance proscribes. Lest there be any doubt, however, an arrest can be made only after a police officer *informs* the loiterers that they must disperse. There can be no question but that a person in those circumstances "should understand that he could be convicted . . . if he fails to obey an order to move on." *Colten v. Kentucky*, 407 U.S. 104, 110 (1972); *cf. Schenck v. Pro-Choice Network*, 117 S. Ct. 855, 869-70 (1997) (defendants, to whom injunction was specifically directed, "certainly" were given "a reasonable opportunity to know what was prohibited").

2. Relying on *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the Illinois Supreme Court evidently concluded that the void-for-vagueness doctrine reaches beyond requiring clarity, and permits courts to examine statutes for substantive conformity with undefined substantive rights. This Court in that case struck as vague a Jacksonville vagrancy ordinance that made it criminal to be, among other things, a "rogue[]," "vagabond[]," "dissolute person[]," "habitual loafer[]," "common railer[] and brawler[]," or a "person wandering or strolling around from place to place without any lawful purpose or object." *Id.* at 156-57 n.1. As the Court noted, the ordinance's long list of undefined and antiquated criminal categories failed to "give fair notice of the offending conduct." *Id.* at 162; *see also Lanzetta v. New Jersey*, 306 U.S. 451, 453-55 (1939) (voiding statute as vague because it made it criminal to be "known [as] a member of a gang" and "the phrase 'consisting of two or more persons' [was] all that purport[ed] to define 'gang' ").

Papachristou is itself far from a model of clarity, and it has led to widespread confusion in the lower courts.

See Livingston, 97 Colum. L. Rev. at 628. Nonetheless, especially when examined in light of this Court's modern approach to substantive due process, the two passages on which the Illinois Supreme Court relied cannot carry the weight that that court placed on them. The first passage referred to "amenities of life" that are "not mentioned in the Constitution or in the Bill of Rights" but that nonetheless may be elements of due process. 405 U.S. at 164; *see* Pet. App. 17a. That passage, however, is not a license for lower courts to discover those "amenities" on their own and in the teeth of the methodology prescribed by this Court in *Graham*, *Albright*, and *Lanier*; indeed, only the most expansive view of what "historically [has been] part of" those "amenities" (*Papachristou*, 405 U.S. at 164) could lead to the conclusion that loitering with criminal gangs is among them. In the second passage on which the court below relied, *Papachristou* emphasized that the activities outlawed by Jacksonville's ordinance "by modern standards are normally innocent." *Id.* at 163; Pet. App. 9a. As its context makes clear, however, nothing in that passage purported to confer on the lower courts unguided discretion to second-guess legislative judgments that specific conduct is *not* "innocent"—the Court's point was simply that an ordinance's lack of clarity is an especial source of concern when the ordinance is applied to conduct that a citizen would not otherwise recognize as culpable. *See Papachristou*, 405 U.S. at 162-63 (emphasizing need for "fair notice"). As already demonstrated, lack of *clarity* is not a failing that can fairly be ascribed to Chicago's ordinance.

3. The Illinois Supreme Court made clear that its real difficulty with the ordinance was not that it is *unclear*, but that it is too *broad*:

> The city has declared gang members a public menace and determined that gang members are too adept at avoiding arrest for all the other crimes they commit. Accordingly, the city council crafted an exceptionally

> broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets.

Pet. App. 16a. The court evidently believed that this Court's decision in *Kolender*, on which it extensively relied, *see* Pet. App. 7a, 14a, 17a, warranted that type of "overbreadth" inquiry under the guise of the void-for-vagueness doctrine. That is incorrect.

Kolender invalidated a state statute that required persons who loiter or wander to produce "credible and reliable" identification and to account for their presence when requested to do so by a peace officer. 461 U.S. at 353. The problem with the statute was *not* that the words "credible and reliable," *objectively* considered, were incapable of defining what forms of identification were satisfactory. Rather, the difficulty was that, as construed by the state courts, the statute required that *the officer* be "satisfied that the identification [was] reliable." *Id.* at 360. Because of "the full discretion accorded to the police" (*ibid.*), the meaning of the statute necessarily changed with each officer's subjective judgment. And since the statute "necessarily entrust[ed] law making to the moment-to-moment judgment of the policeman on his beat" (*ibid.*), the Court concluded that the State had failed "to establish standards by which the officers may determine whether the suspect has complied with the * * * requirement." *Id.* at 361; *see also Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (similarly invalidating statute with standards so subjective that "a violation may entirely depend upon whether or not a policeman is annoyed"); *compare Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 526 (1994) (no vagueness problem where statute "set[] forth objective criteria for assessing whether items constitute drug paraphernalia").

Kolender emphasized the dual concerns of the vagueness doctrine—notice and the prevention of arbitrary enforcement—repeatedly, causing the court below to treat

those concerns as a two-prong "test." Pet. App. 7a, 14a. That reasoning appears to have led the Illinois court to conclude that any law that is broad enough to permit selectivity in investigation or prosecution encourages "arbitrary enforcement" and is therefore "vague." Neither *Kolender* nor any other opinion of this Court, however, stands for the proposition that clearly worded and objectively defined statutory language is *vague* simply because it gives police officers and prosecutors a *choice* in making charging decisions. To the contrary, the Court has consistently recognized that "[s]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, or what charge to file or bring * * * generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *Whren*, 517 U.S. at 818-19 (same for police officers); *see also United States v. Armstrong*, 517 U.S. 456 (1996). Indeed, the Court in *Whren* disclaimed even the *ability* to engage in the sort of open-ended review of the "breadth" of statutes that the court below undertook: "[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement." 517 U.S. at 818.

4. Of course, there *is* a doctrine of "overbreadth" that is distinct from vagueness. Like vagueness, however, it is limited in reach.[5] This Court has made clear that a

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[5] The repeated citation by the court below of *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965), an overbreadth case, suggests that the court below did not see any significant distinction between the two doctrines. *See* Pet. App. 8a, 12a-13a. The ordinance at issue in *Shuttlesworth*, however, made it a crime "to stand *or* loiter upon any street or sidewalk . . . after having been requested by any police officer to move on." 382 U.S. at 90. This Court's concern was primarily with the blanket prohibition on "standing" on a public street, which was permeated "with [an] ever-present potential for arbitrarily suppressing First Amendment liberties." *Id.* at 90-91. Indeed, the Court noted that the ordinance had been

legislative enactment can be declared unconstitutionally "overbroad" only if it "prohibits constitutionally protected conduct." *Grayned v. City of Rockford,* 408 U.S. 104, 114 (1972). The applicability of that doctrine therefore turns on the same questions under the Bill of Rights, particularly the First Amendment, that the Illinois Supreme Court expressly *declined* to reach. *See, e.g., Boos v. Barry,* 485 U.S. 312, 329 (1988) (in addressing overbreadth challenge, "a court's first task is to ascertain whether the enactment reaches a substantial amount of constitutionally protected conduct"). Indeed, this Court "ha[s] not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *United States v. Salerno,* 481 U.S. at 745. Because the Chicago ordinance does not infringe on any First Amendment interests, its mere breadth cannot serve as a basis for facial invalidation. Indeed, even in cases where it applies, "[t]he overbreadth doctrine is 'strong medicine' that is used 'sparingly and only as a last resort.'" *New York State Club Ass'n,* 487 U.S. at 14 (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973)). Here, respondents cannot show that the ordinance is *substantially* overbroad in that it threatens the valid "associational or expressive purposes" of a *substantial* number of those to whom it might be applied. *Id.* at 11, 14-15.

In any event, the Chicago Police have prepared detailed guidelines for the enforcement of the ordinance, which eliminate any question that the broad language of the ordinance itself might pose. Pet. App. 64a-73a. The court below rejected those guidelines on the ground that "[i]t is the duty of the lawmakers to establish minimal guidelines to govern law enforcement." Pet. App. 16a. But nothing in our Constitution governs the manner in which States, or local governments, allocate their legis-

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narrowed since the events in that case. Once the ordinance was narrowed to apply to loiterers who obstructed free passage and "refused to obey a request by an officer to move on," the Court could "not say that the ordinance is unconstitutional." *Id.* at 91.

lative functions. *Highland Farms Dairy, Inc. v. Agnew,* 300 U.S. 608, 612-613 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself"); *Dreyer v. Illinois,* 187 U.S. 71, 83-84 (1902) (due process does not require separation of state powers). This Court frequently looks to administrative constructions in determining whether state statutes are constitutional. *See, e.g., Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 n.5 (1982) ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or *enforcement agency* has proffered") (emphasis added); *see also Ward v. Rock Against Racism,* 491 U.S. 781, 795 (1989) ("Even if the language of the guideline were not sufficient on its face to withstand constitutional challenge, * * * the city has interpreted the guideline in such a manner as to provide additional guidance to the officials charged with its enforcement").

The Chicago police guidelines were adopted not only to narrow the breadth of the ordinance, but to avoid any possibility of arbitrary enforcement: "In order to ensure that the anti-gang loitering ordinance is not enforced in an arbitrary or discriminatory way, this directive [establishing the guidelines] establishes limitations on the enforcement discretion of Department members, and thereby provides for enforcement of the ordinance in a fair and principled way." Pet. App. 65a. Even a cursory review of the numerous and detailed discretion-guiding provisions of the police guidelines demonstrates that officers on the street have less discretion in enforcing the ordinance than they do, for example, in enforcing the traffic laws. *Cf. Whren,* 517 U.S. at 818-19. The Court must presume that the police officers who enforce the gang-loitering ordinance, and the prosecutors and courts who will thereafter review those officers' work, will do so fairly. *See, e.g., United States v. Mezzanatto,* 513 U.S. 196, 210

(1995); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).

* * * *

The Supreme Court of Illinois expressly recognized that "[c]riminal street gangs are an expanding cancer in our society and their illegal activities endanger the safety of many law-abiding citizens." Pet. App. 17a. That assessment has been echoed by another state court of last resort, *see People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal.), *cert. denied*, 117 S. Ct. 2513 (1997), and doubtless represents a realistic appraisal of the compelling interests that the Chicago City Council sought to further with its gang-loitering ordinance. Yet, through an unwarranted expansion of "substantive due process" and "vagueness" doctrines, the Illinois court disabled the citizenry of that State from dealing effectively with that "cancer." Because the Supreme Court of Illinois clearly misread this Court's precedents, its judgment should be reversed.

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1997

CITY OF CHICAGO,
Petitioner,
v.
JESUS MORALES, ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF *AMICI CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION AND INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE IN SUPPORT OF PETITIONER CITY OF CHICAGO

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No. 97-1121

In the Supreme Court of the United States

OCTOBER TERM, 1997

CITY OF CHICAGO, *Petitioner*,
v.
JESUS MORALES, ET AL., *Respondents*.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF *AMICI CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION AND INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE IN SUPPORT OF PETITIONER CITY OF CHICAGO

Pursuant to this Court's Rule 37.3, *amici curiae* National District Attorneys Association, Inc. ("NDAA") and International Association of Chiefs of Police, Inc. ("IACP") respectfully submit this brief urging this Court to reverse the judgment of the Supreme Court of Illinois and to hold that Chicago Municipal Code § 8-4-015 is consistent with the Due Process Clause of the Fourteenth Amendment.[1]

INTEREST OF *AMICI CURIAE*

The NDAA is the sole organization representing local prosecuting attorneys across the United States. Since its founding in 1950, the NDAA's programs of education,

[1] This brief is filed with the consent of both petitioner and respondents, and letters reflecting those consents have been lodged with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *amici curiae* NDAA and IACP state that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than *amici*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all citizens. NDAA members are responsible for the vast majority of criminal prosecutions in this country, and are at the front line in attempting to combat the serious problems presented by the violent and lawless activities of criminal street gangs. Members of the NDAA have long shared the concern that sufficient means be developed to reduce the alarming trend of gang violence in our Nation's cities, and the NDAA strongly believes that localities should be permitted to employ creative approaches to fighting gang-related criminal activity. The NDAA therefore has a compelling interest in the outcome of this case.

The IACP is the largest organization of police executives and line officers in the world, consisting of more than 16,000 members in 96 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital law enforcement services more effective, while at the same time protecting the rights of all our citizens. Members of the IACP have an important responsibility to protect the communities they serve from the dangers posed by criminal street gangs, and measures such as the Chicago ordinance at issue in this case are a valuable contribution to that effort. The IACP therefore has a vital interest in this case.

SUMMARY OF ARGUMENT

In recent years, criminal street gangs—groups comprised of dangerous criminals joined together in a highly cohesive organizational structure—have become an increasingly serious problem plaguing our Nation's cities. Because maintenance of "turf" is vital to a gang's unlawful aims, gang members regularly engage in loitering in order to claim territory, to recruit new members, and to intimidate rival gangs members and area residents.

Chicago Municipal Code § 8-4-015 attempts specifically

to address the problem of gang loitering. The first sentence of § 8-4-015(a) authorizes a police officer to order a group of loiterers that he or she has probable cause to believe contains a criminal street gang member "to disperse and remove themselves from the area." The second sentence of that section requires those individuals promptly to comply with such an order. Neither sentence is vague.

Although vagueness doctrine "focuses both on actual notice to citizens and [on] arbitrary enforcement," this Court has observed that "the more important aspect of the vagueness doctrine" is the requirement that sufficient standards be provided to channel the discretion of law enforcement officers. *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983). Moreover, in evaluating whether the first sentence of § 8-4-015(a) is vague, the question necessarily focuses on whether the ordinance sufficiently cabins police discretion. Because the first sentence does not require any citizen to do anything unless and until a dispersal order is issued, the only question of "fair notice" raised by this sentence is whether the ordinance, as a general matter, adequately limits police discretion in "words of common understanding." *Boos* v. *Barry*, 485 U.S. 312, 332 (1988).

The ordinance adequately limits police discretion to issue dispersal orders. The ordinance defines "loiter" as "to remain in one place with no apparent purpose." *See* § 8-4-015(c)(1). This term is sufficiently limited to avoid the problems concerning the quite different ordinances at issue in *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87 (1965), and *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972), which were drafted in such broads terms that they could have been applied to literally *anyone* on the streets. Here, the definition of "loitering" sets a specific, objective test: a person has no "apparent purpose" for remaining in one place if a reasonable person viewing the person's behavior under the circumstances would not perceive a reason why that person is remaining in one place.

The Chicago ordinance imposes further substantial

limits on the discretion of police officers by providing that a dispersal order may be issued to a group of loiterers only if it contains at least one person whom the officer "reasonably believes to be a criminal street gang member." The ordinance contains a detailed definition of "criminal street gang" that provides the sort of objective criteria that were missing from the very broad definition of "gang" that was found to be vague in *Lanzetta* v. *New Jersey*, 306 U.S. 451, 457 (1939). Moreover, the ordinance does not permit officers randomly to label anyone they want as a "member" of a criminal street gang; rather, they must have objective probable cause of gang membership.

In any event, if further narrowing were required, it is more than adequately supplied by the additional restrictions of the Chicago Police Department's General Order 92-4, which implements the ordinance. The lower court simply refused to consider the Order, reasoning that federal vagueness doctrine required that the necessary narrowing of discretion be done entirely by the city's legislature. This holding is flatly contrary to this Court's cases. *See, e.g.*, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 795-96 (1989).

The second sentence of §8-4-015(a), which requires citizens promptly to obey a dispersal order, is also not impermissibly vague. The standard of conduct defined by this sentence—that persons who receive a dispersal order must "remove themselves from the area"—is not vague under this Court's cases. *See Cox* v. *Louisiana*, 379 U.S. 536, 551 (1965) ("move on" order "is narrow and specific").

The Illinois Supreme Court went further, however, and held that the ordinance must also, in effect, ensure that a citizen has a sufficient factual basis to evaluate whether the order has been properly issued. This latter requirement finds no support in the cases of this Court. Statutes prohibiting resisting arrest, for example, have never been thought to be vague simply because the arrestee may not comprehend all of the facts that comprise the officer's probable cause to arrest. In any event, the ordinance here

provides sufficient guidance for avoiding a police order to disperse: refrain from loitering with gang members.

The lower court also invalidated the ordinance on the ground that it violates "substantive due process," holding that the ordinance effected an "arbitrary" deprivation of the "personal liberty interests" in freedom of movement and in associating with others. In so ruling, the lower court erred.

Although the lower court declined to consider whether the ordinance infringed "*fundamental* rights," it is clear that it does not do so. Although this Court long has recognized a right to travel from state to state and abroad, and has at times referred more loosely to a "constitutional right to freedom of movement," *see Kolender*, 461 U.S. at 358, it is clear that there is no generalized fundamental right to be free of all restrictions upon one's physical movement. Nor does the ordinance implicate fundamental rights of association. *See City of Dallas* v. *Stanglin*, 490 U.S. 19, 24 (1989).

Assuming *arguendo* that the court below was correct in concluding that the ordinance implicates "liberty interests" that comprise a "substantive component of the Due Process Clause," the interest asserted is at best a narrow one—the right to remain in a public place after having been asked to move on by an officer who reasonably believes that the group of loiterers includes at least one criminal street gang member. For several reasons, the ordinance does not arbitrarily infringe this "liberty interest."

First, the burden imposed by the ordinance is the fairly modest one of moving on when ordered to do so. Second, the ordinance clearly furthers a legitimate state interest by regulating a behavior—gang loitering—that the city has found to be *both* harmful in its own right (because it intimidates residents) *and* likely to lead to the commission of more serious crimes. Third, by targeting gang loitering, the ordinance provides a "reasonable fit" with those legitimate interests. *Reno* v. *Flores*, 507 U.S. 292, 305 (1993).

ARGUMENT

A. Chicago's Gang Loitering Ordinance Is a Targeted Response to the Very Real Problems Posed by Criminal Street Gangs

1. The Deleterious Effects of Loitering by Street Gang Members Are Well Documented

In recent years, criminal street gangs have become an increasingly serious problem. All too often, one hears of another drive-by shooting in which an innocent bystander is killed; another "turf" battle that leaves one or more teenage gang members dead; or another neighborhood in which gang members regularly harass and intimidate residents. *See, e.g.*, Tamaki, *Boy's Slaying In 'Good' Area Stuns Family*, L.A. Times, June 15, 1998, at A1; *2 Teens Charged In Gang Shooting*, Chi. Trib., June 14, 1998, at 3.

The statistics are staggering. A recent study indicates that gangs are active in all 50 States, and that over 650,000 young men and women are active in over 25,000 gangs. *See* Press Release, U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, *New Survey Finds 25,009 Youth Gangs With More Than 650,000 Members* (June 20, 1996). Another study has shown that, in 1992, those gangs committed over 46,000 crimes, including over 1,000 homicides. Curry et al., *Gang Crime And Law Enforcement Recordkeeping*, Nat'l Inst. for Justice, U.S. Dept. of Justice (June 1994). Gangs "now operate in cities of all sizes, as well as suburban communities throughout the United States." U.S. Dept. of Justice, Bureau of Justice Assistance, *Urban Street Gang Enforcement* (Jan. 1997).

The gang problem is particularly acute in major cities. In Chicago, for example, the four largest street gangs—which include the Gangster Disciples, the Latin Kings, the Latin Disciples, and the Vice Lords—exercise control over large sections of the city. Statement of Steven R. Wiley, Chief of FBI's Violent Crimes and Major Offenders Section,

before the U.S. Senate Comm. on the Judiciary, Apr. 23, 1997 ("Wiley Statement"). In 1994, 26 percent of all homicides in Chicago were gang-related. *Rodriguez Praises Police and Community for Continued Crime Reduction*, 1995 Crime and Murder Analysis News Conference (Jan. 4, 1996) ("Rodriguez Statement"). As the court below recognized, gangs "are responsible for a variety of criminal activity, including drive-by shootings, drug dealing, and vandalism." Pet. App. 2a.

Today's gangs cannot be confused with the charming band of youths that harassed Officer Krupke in *West Side Story*. Modern-day street gangs are comprised of dangerous criminals who are joined together in a highly cohesive organizational structure. In this regard, the Department of Justice has identified five criteria that distinguish gangs from other groups: (1) formal organizational structures; (2) identifiable leadership; (3) identification with a territory; (4) recurrent interaction; and (5) a history of engaging in serious or violent criminal activity. *See* U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention Fact Sheet # 12. Their members commit crimes at rates far exceeding those of the population generally, and recidivism rates among gang members are inordinately high. *See* Wiley Statement, *supra*.

For the criminal street gang, "turf" is currency. By physically dominating the streets of a neighborhood, gangs are able to establish lucrative monopolies over the drug trade in those areas. "Area co-ordinators" for gangs like the Gangster Disciples wield control over a square mile or more of a neighborhood, conscripting teams of "soldiers," "runners," and "look-outs" to distribute drugs, recruit new members, avoid police detection of criminal activity, and keep rival gangs out of the area. *There Are No Children Here*, Economist, Dec. 17, 1994, at 21.

Because possession and maintenance of turf is the *sine qua non* of gang existence, gangs routinely position small groups of members in strategic locations throughout their

respective territories to signify, both to community members and to would-be rivals, that those areas belong to them. These groups of gang members loitering on street corners are magnets for violence, as posturing between members of rival gangs often ends in gunfire. Indeed, most gang violence is the "product of old-fashioned fights over turf, status and revenge . . . ." Wiley Statement, *supra*.

Traditional law enforcement methods have proven ineffective in controlling the spread of gang activity. *See* Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va. L. Rev. 349, 375 (1997); NDAA, *Resource Manual and Policy Positions on Juvenile Crime Issues* 18-20 (Nov. 1996). Rather, measures and enforcement strategies targeted specifically at the unique problems presented by gangs are essential. *Id.* Accordingly, communities throughout the country are testing various approaches to addressing the problem of street gangs. In California, for example, courts have issued nuisance injunctions against gang activities. *See generally People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, *cert. denied*, 117 S. Ct. 2513 (1997).

The common theme motivating these law enforcement approaches to gang activity is the desire to *prevent* violent crime through prophylactic measures administered by local police officers and local prosecutors in close cooperation with community members who are most aware of the problems at hand. These measures are part of a broader trend in law enforcement, involving community policing and community prosecution. Livingston, *Police Discretion And The Quality Of Life In Public Places: Courts, Communities, And The New Policing*, 97 Colum. L. Rev. 551, 561 (1997). According to community policing theory, law enforcement efforts are most successful when "police are a visible presence in communities, oriented toward crime prevention and problem-solving, and working toward partnership with communities." *Id.* at 563. Dispersing gang members who loiter in public areas, either through the enforcement of injunctions or through the issuance of orders to "move on,"

sends a clear message that the community will no longer tolerate gang intimidation and disorder. Kahan, *supra*, at 376. These measures reduce the opportunities for gang members to maintain "turf," to recruit new members, to intimidate residents, and to commit serious crimes.

2. Chicago's Ordinance Is a Targeted Response to the Problems Posed by Gang Loitering

During the hearings that led to passage of Chicago's gang loitering ordinance, witnesses from the community and the police department testified about the specific problems created by gang loitering. As summarized by the Illinois Supreme Court, this testimony established that "gang members loiter as part of a strategy to claim territory, recruit new members, and intimidate rival gangs and ordinary community residents." Pet. App. 2a. Because of the central role that loitering plays in maintaining a gang's control over an area, and the inherent intimidation that such loitering causes to neighborhood residents, the City Council concluded that an ordinance targeted specifically at that conduct was necessary to address these unique problems. *Id.* at 60a-61a.

Accordingly, the City Council enacted an ordinance adding a new § 8-4-015 to the Chicago Municipal Code that directly addresses gang loitering. Subsection (a) provides that "[w]henever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area." Pet. App. 61a. In order to limit the discretion of police officers to issue such dispersal orders, the ordinance provides specific definitions of the terms "loiter" and "criminal street gang." "Loitering" is defined, not as "standing" *simpliciter* or "wandering around with no lawful purpose," *cf. Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87, 90 (1965); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 156 n.1 (1972), but as "remain-[ing] in any one place with no apparent purpose." *See*

§ 8-4-015(c)(1), Pet. App. 61a. "Criminal street gang" is defined with a high degree of specificity to ensure that the term can be applied only to those particular organized groups that represent the core of the modern-day "street gang" phenomenon. Specifically, § 8-4-015(c)(2) defines a "criminal street gang" as an "ongoing organization, association in fact or group of three or more persons" that has as one of its "substantial activities" the commission of one or more enumerated felonies, and "whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." Pet. App. 61a-62a. "Criminal gang activity" is further defined to mean the commission of certain enumerated felonies "with the specific intent to promote, further, or assist in any criminal conduct by gang members." *See* § 8-4-015(c)(3), Pet. App. 62a.

At the time that the ordinance was being considered, the Chicago Police Department informed the City Council that, if the measure were adopted, the Department would promulgate implementing regulations that would provide further specific guidance concerning enforcement of the ordinance. Pet. 4-5 (citing record). Accordingly, after the ordinance was enacted, the Department issued General Order 92-4, which provides several detailed guidelines for its enforcement. First, the Order requires the Department to identify, using certain specified types of reliable information, those specific gangs that operate in Chicago. Pet. App. 66a-67a. Second, the Order provides that determinations concerning who is and is not a "criminal street gang member" within the meaning of the ordinance may be made only on the basis of "specific, documented and reliable information," such as the person's admission of gang membership, his or her wearing of "distinctive emblems, tattoos, or similar markings," the person's use of signals distinctive to a particular street gang, or information from a reliable informant that the person is a member of a specific street gang. *Id.* at 67a-68a. The Order specifically prohibits an officer from establishing gang membership based solely on the wearing of "clothing available for sale to the general

public." *Id.* at 67a. Third, the Order limits the geographical locations in which the ordinance can be enforced to those specific areas of the City that have been formally designated by the Department as involving significant gang activity. *Id.* at 68a-69a. Fourth, the Order provides that only members of the Department's "Gang Crime Section" and other specially designated officers are eligible to make arrests under the ordinance. *Id.* at 65a.

During the period that the Chicago ordinance was enforced, it was very successful. In 1995, the last year before the ordinance was struck down, gang-related murders declined by over 25 percent. Rodriguez Statement, *supra*. By contrast, during the first year after the ordinance was invalidated, gang-related homicides *rose* by 11%. Pet. 9 n.5. These statistics confirm Professor Livingston's prediction that the invalidation of such laws would "seriously impair[] legitimate community efforts to enhance the quality of neighborhood life." Livingston, *supra*, at 561.

B. The Illinois Supreme Court Erred in Concluding That the Chicago Gang Loitering Ordinance Was Unconstitutionally Vague

The Illinois Supreme Court's decision below rests upon a fundamental misunderstanding of how the vagueness doctrine applies in the context of an ordinance requiring compliance with a police order. As explained below, the doctrine in this context has two requirements. First, the police officer's power to issue an order must be circumscribed according to objectively defined criteria. Second, the substantive content of the orders authorized by the ordinance must be sufficiently clear so that the citizen toward whom the order is directed can determine what must be done to comply with it and so that the officer may evaluate the citizen's compliance according to objective criteria. The ordinance is this case easily satisfies these requirements. In its analysis, however, the Illinois Supreme Court effectively created a third requirement—namely, that the ordinance must ensure that the citizen has sufficient

knowledge to permit him or her independently to evaluate whether the officer was empowered to issue the command. This novel requirement finds no support in this Court's cases, and would lead to demonstrably absurd results.

1. The Requirements of the Vagueness Doctrine

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1. "'The touchstone of due process is protection of the individual against arbitrary action of government.'" *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) (citation omitted). Accordingly, the protections afforded by this clause have long been held to include a requirement that laws and regulations set forth their commands with sufficient clarity. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); *see also Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). This requirement protects against two related evils. First, "[v]ague laws may trap the innocent by not providing fair warning" as to what is expected of citizens. *Grayned*, 408 U.S. at 108. Second, '[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with attendant dangers of arbitrary and discriminatory application." *Id.*

Although vagueness doctrine thus "focuses both on actual notice to citizens and [on] arbitrary enforcement," this Court has observed that "the more important aspect of the vagueness doctrine," *Kolender*, 461 U.S. at 357-58, is the requirement that sufficient standards be provided for enforcement and that the determination of what constitutes a violation not be left to "'the moment-to-moment judgment of the policeman on his beat,'" *Smith* v. *Goguen*, 415 U.S. 566, 575 (1974) (citation omitted).

While due process requires some degree of definiteness,

this Court has cautioned that "we can never expect mathematical certainty from our language." *Grayned*, 408 U.S. at 110. Thus, "due process does not require 'impossible standards' of clarity." *Kolender*, 461 U.S. at 361 (citation omitted). Rather, an enactment provides sufficient notice if it "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned*, 408 U.S. at 108.

2. The Ordinance Is Not Impermissibly Vague

Section 8-4-015(a) of the Chicago gang loitering ordinance does two things. The first sentence of § 8-4-015(a) authorizes police officers to issue a dispersal order to particular citizens under certain prescribed circumstances. The second sentence requires those individuals promptly to comply with such an order. *See* Pet. App. 61a-63a. In light of the other provisions of the ordinance that define the relevant terms, neither sentence is vague.

a. The Ordinance Adequately Channels The Discretion Of Individual Police Officers To Issue Dispersal Orders

The first sentence of § 8-4-015(a) authorizes a police officer to issue a dispersal order if and only if the officer observes (1) a person whom he or she reasonably believes to be a "criminal street gang member" (2) loitering (3) in a public place (4) with one or more other persons. Pet. App. 61a. If all four of these criteria are met, then a dispersal order may be issued. The Illinois Supreme Court found the first two of these criteria to be impermissibly vague, and it therefore held that the ordinance failed to "discourage arbitrary or discriminatory enforcement." Pet. App. 15a. The lower court plainly erred.

In evaluating whether the first sentence of § 8-4-015(a) is impermissibly vague, the question necessarily focuses on whether the ordinance sufficiently channels the discretion of a police officer to issue such an order. *Shuttlesworth*, 382 U.S. at 90-91; *Boos* v. *Barry*, 485 U.S. 312, 330-32 (1988).

Indeed, unless and until a dispersal order has been issued, § 8-4-015(a) does not require *any* citizen to do *any*thing. Accordingly, questions of fair notice do not arise until after the order has issued, and those questions are addressed below. *See infra* at 23-27.

This Court has made clear that enactments that wholly fail to provide individual police officers with any objective guidelines for issuing dispersal orders are unconstitutional. For example, in *Shuttlesworth*, this Court considered the constitutionality of a conviction obtained under an ordinance that made it an offense "'*to stand* or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on.'" 382 U.S. at 90 (emphasis added; citation omitted). This Court observed that, literally read, this provision "says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city." *Id.* This Court concluded that the literal reading, which authorized officers to issue "move-on" orders to anyone *standing* under any circumstances on any Birmingham street, would be unconstitutionally vague. *Id.* at 90 & n.5. This Court noted, however, that the Alabama Supreme Court had read the ordinance more narrowly to permit an officer to order a citizen to move on only when the citizen was blocking free passage on the sidewalk. *Id.* at 91. This Court held that, so construed, the ordinance was constitutional. *Id.*[2]

Similarly, in *Boos* v. *Barry*, this Court addressed a District of Columbia statute that made it unlawful to "'congregate within 500 feet of any [embassy, legation, or

[2] The particular conviction at issue in *Shuttlesworth* occurred two years *before* the Alabama Supreme Court adopted this narrowing construction. 382 U.S. at 91-92. Accordingly, this Court was unable to determine whether Shuttlesworth had been convicted under a literal (and unconstitutional) construction of the ordinance or instead under the more narrow reading later adopted by the Alabama Supreme Court. *Id.* at 92. Because *Shuttlesworth*'s conviction may have rested on the unconstitutional reading, it was reversed. *Id.*

consulate] and refuse to disperse after having been ordered to do so by the police.'" 485 U.S at 329. This Court noted that, "[s]tanding alone, this text is problematic both because it applies to any congregation within 500 feet of an embassy for any reason *and because it appears to place no limits at all on the dispersal authority of the police*." *Id.* at 330 (emphasis added; emphasis in original deleted). This Court found, however, that the narrowing construction adopted by the Court of Appeals sufficiently limited the discretion of the police and cured any vagueness problem. *Id.* at 330-32. Under this limiting construction, the police could issue an order to disperse only where "normal embassy activities have been or are about to be disrupted." *Id.* at 332. This Court held that, so construed, the statute was not impermissibly vague. *Id.*

Construed against this precedent, the ordinance adequately channels the discretion of police officers to issue dispersal orders. Consistent with *Shuttlesworth* and *Boos*, the ordinance does not confer unfettered discretion to order any person standing on the streets of Chicago to move on; rather, it authorizes a dispersal order only when a person whom the officer reasonably believes to be a "criminal street gang" member is "loitering" with one or more other persons. Like the enactments upheld against facial challenges in *Shuttlesworth* and *Boos*, the Chicago ordinance limits its applicability to a specific type of public congregation that has been determined by the city council to present particular harms that warrant the issuance of dispersal orders. *Shuttlesworth*, 382 U.S. at 91; *Boos*, 485 U.S. at 332.

b. The Lower Court Erred In Concluding That The Ordinance Does Not Sufficiently Limit Discretion To Issue Dispersal Orders

Despite these limitations imposed by the terms of the ordinance itself, the Illinois Supreme Court found the ordinance to be vague because, in the court's view, the definitions of the terms "loitering" and "criminal street gang" left "absolute" or "complete" discretion to individual

police officers. Pet. App. 15a-16a. As such, the lower court concluded that the Chicago ordinance suffered from the same defect presented by the literal reading of the *Shuttlesworth* ordinance, namely, that it "allow[s] a person to 'stand on a public sidewalk . . . only at the whim of any police officer.'" Pet. App. 13a (quoting *Shuttlesworth*, 382 U.S. at 90-92). As set forth below, the court erred.

(1) The Ordinance's Definition Of "Loitering" Is Not Vague

The ordinance defines "loiter" as "to remain in one place with no apparent purpose." *See* § 8-4-015(c)(1), Pet. App. 61a. This definition provides sufficient objective guidance to channel a police officer's discretion to issue a dispersal order. "To remain in one place" is hardly a subjective concept, and the lower court did not contend otherwise. *See* Pet. App. 10a. The second element of the definition also is not vague: a person has no "apparent purpose" for remaining in one place if a reasonable person viewing the person's behavior under the circumstances would not perceive a reason why that person is remaining in that place.

The Illinois Supreme Court concluded that this definition was vague because police officers might fail to perceive the purposes of, for example, "a person waiting to hail a taxi, resting on a corner during a jog, or stepping into a doorway to evade a rain shower." Pet. App. 10a. This reasoning is nonsensical. Given that hailing a taxi requires making one's purpose known to *passing cab drivers*, it is unfathomable how the would-be cab rider could possibly fail also to make his or her intentions known to observing police officers. Similarly, the notion that police officers will mistake a sweaty, out-of-breath person dressed in jogging attire as being a purposeless "loiterer" is far-fetched in the extreme. In any event, the fact that the ordinance might be misapplied in certain hypothetical situations does not provide a ground for invalidating it on its face. *See Maynard* v. *Cartwright*, 486 U.S. 356, 361 (1988) ("Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis").

The lower court also expressed concern that loitering is a very common activity, and that the ordinance's reference to "loitering" therefore does not provide much of a check against arbitrary sweeps by police officers seeking to "remov[e] 'undesirable persons' from public." Pet. App. 8a; *see also id.* at 14a, 16a-17a. In reaching this conclusion, the lower court construed *Shuttlesworth* and *Papachristou* as standing for the proposition that a "loitering alone" ordinance is void-for-vagueness, Pet. App. 8a, 16a-17a, but neither decision supports that court's view.

As noted above, *Shuttlesworth* involved an ordinance authorizing police officers to order any person *"stand[ing]* or loiter[ing]" on the street to move on. 382 U.S. at 90 (emphasis added). This Court's conclusion that a literal reading of the Birmingham ordinance would be unconstitutional was based, not on the enactment's use of the term "loiter," but on its use of the substantially broader term "stand." *See Id.* ("Literally read, therefore, the second part of this ordinance says that a person may *stand* on a public sidewalk in Birmingham only at the whim of any police officer of that city.") (emphasis added).

In *Papachristou*, the Jacksonville ordinance did not use the term "loitering," but instead prohibited, *inter alia*, "'persons wandering or strolling around from place to place without any lawful purpose or object.'" 405 U.S. at 156 n.1 (quoting Jacksonville Ordinance Code § 26-57). This definition is substantially broader than that used in the Chicago ordinance. Because literally everyone on the streets at some point moves from one place to another, the Jacksonville ordinance's reference to "wandering or strolling" could be applied to virtually anyone. By contrast, not everyone on the public streets "remain[s] in one place" for a significant period of time. Moreover, it is often very difficult to discern the apparent purpose of a person who is *moving* from one place to another, and this Court therefore

properly concluded that "[t]he qualification 'without any lawful purpose or object'" in Jacksonville's ordinance "may be a trap for innocent acts." *Id.* at 164. Where, however, several persons continue to "remain in one place" over time, it is substantially more likely that they will exhibit behavior that demonstrates their connection to that spot and their apparent reasons for continuing to remain there. Additionally, the ordinance in *Papachristou* authorized officers to *arrest and prosecute* persons who were "wandering or strolling"; the Chicago ordinance merely authorizes the police to order such persons to move on. *Cf. Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) (noting that vagueness standards are applied with less stringency where "the consequences of imprecision are qualitatively less severe").[3]

(2) The Ordinance Sufficiently Defines "Criminal Street Gang Member"

In any event, even if a "loitering alone" ordinance were impermissibly vague, the Chicago ordinance imposes further substantial limits on the discretion of police officers by providing that an order to disperse may be issued to a group of loiterers only if that group contains at least one person whom the officer "reasonably believes to be a criminal street gang member." Pet. App. 61a. The Illinois Supreme Court expressed concern that in practice the ordinance would give the police "complete discretion to determine whether any members of a group are gang

[3] Moreover, nothing in this Court's post-*Papachristou* cases supports the lower court's view that all enactments prohibiting loitering *simpliciter* are "doubtlessly unconstitutional." Pet. App. 8a. Indeed, since the decision in *Papachristou*, this Court has granted review in four cases that challenged loitering ordinances, but in none of these cases did the Court reach the question whether the ordinance's definition of "loitering" was impermissibly vague. Three of the cases were decided on other grounds, *see Kolender*, 461 U.S. at 361 n.10; *Stone* v. *Powell*, 428 U.S. 465, 471 n.2 (1976); *Ellis* v. *Dyson*, 421 U.S. 426, 427 (1975), and one was dismissed as improvidently granted, *see New York* v. *Uplinger*, 467 U.S. 246, 247-49 (1984).

members," *Id.*, 15a, but that concern is plainly unfounded.

As noted earlier, *see supra* at 10, the Chicago ordinance contains a specific and detailed definition of "criminal street gang" that ensures that the term can be applied only to the sort of organized and cohesive criminal groups that in contemporary society are commonly understood by all to be "street gangs." As such, the term "criminal street gang" does not refer to some abstract and amorphous concept that may be applied by the police to whomever they wish; on the contrary, it applies to a specific, well documented, and all too familiar social reality of modern-day America. The ordinance's definition thus provides the sort of objective criteria that were missing from the very different definition of "gang" that was found to be vague in *Lanzetta* v. *New Jersey*, 306 U.S. 451, 457 (1939) (invalidating, on vagueness grounds, a "gangster" statute in which "gang" had been construed by the state courts as meaning, *inter alia*, "a company of persons acting together for some purpose, usually criminal"). Indeed, the lower court did *not* contend that the definition of "criminal street gang" in the Chicago ordinance was vague, nor could it.

Similarly, the ordinance does not permit officers randomly to label anyone they want as a "member" of a criminal street gang. As the Illinois Supreme Court noted, the ordinance's requirement that an officer have "a reasonable belief" that a person is a gang member means that the officer must have "probable cause" on this issue. Pet. App. 11a; *see also* Pet. App. 71a (General Order 92-4, construing the ordinance the same way). "Probable cause" exists with respect to a particular fact only if "the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief" that the fact is true. *Ornelas* v. *United States*, 116 S. Ct. 1657, 1661 (1996). Accordingly, the Chicago ordinance requires the police to possess sufficient facts to warrant an *objectively* reasonable belief that an individual is a member of a "criminal street gang" within the ordinance's highly specific meaning of that term.

In light of the objective standards imposed by the ordinance, the Illinois Supreme Court's concern that the ordinance gives officers "complete discretion" to determine gang membership is unfathomable. The court below contended that a probable cause standard "depends solely on the police officer's *subjective* evaluation of the facts of the situation in light of his own experience," Pet. App. 12a (citing *Kolender*, 461 U.S. at 368-69 (Brennan, J., concurring)) (emphasis added), but that is demonstrably untrue, as even the sole opinion cited by the lower court makes clear. What Justice Brennan said in his separate opinion in *Kolender* was not what the Illinois Supreme Court attributed to him; rather, he merely observed, consistent with settled law, that standards such as "probable cause" and "reasonable suspicion" depend "solely on the *objective* facts known to the officers and evaluated in light of their experience." 461 U.S. at 368-69 (emphasis added). The fact that the lower court plainly mis-cited the only authority on which it relied leaves no doubt as to its error. *See Ornelas*, 116 S. Ct. at 1661-62 (noting that probable cause and reasonable suspicion are objective standards).[4] Indeed, if probable cause determinations concerning objective facts were insufficient to channel an officer's discretion, then the entirety of the criminal law would be impermissibly vague. Throughout the course of their duties, officers are required to make probable cause determinations concerning all sorts of facts, and the court below did not identify any basis for believing that the fact of gang membership is not subject to reliable probable cause determinations.[5]

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[4] *See also People v. Agnello*, 259 Cal. App. 2d 785, 792 (1968) (rejecting a vagueness challenge to a similar statute, holding that "[t]he criterion is not what subjectively appears reasonable to the actor whose decision is in question, but what would appear to a reasonable man in the actor's situation to be reasonable.") .

[5] Nor could it have done so. As one commentator has noted, "[g]ang membership is clearly susceptible to articulable, objective, reasonable discernment by well-trained and experienced members of law enforcement." Lassiter, *The Stop And Frisk Of Criminal Street Gang Members*, 14 Nat'l Black L.J. 1, 35 (1995). Gang symbols worn on clothing, gang-specific symbols displayed on tatoos and elsewhere, communications through distinctive hand signals, and efforts generally to demonstrate to passersby their control over their "territorial haunts" all provide trained law enforcement officers with "objective positive evidence marking members of criminal street gangs." *Id.*

The Illinois Supreme Court's holding also appears to rest on the alternative view that the Chicago ordinance fails to cabin police officers' discretion because it permits officers to order *any and all* loitering gang members to move. Pet. App. 16a (stating that the ordinance "could be used to sweep these intolerable and objectionable gang members from the city streets"). In reaching this conclusion, the lower court relied on *Papachristou*, but this case is a far cry indeed from the ordinance presented there. As noted above, the ordinance in *Papachristou* could have been applied to virtually anyone on the streets of Jacksonville, and it therefore was a standardless delegation of authority to individual officers to arrest whomever they wanted. In this case, by contrast, the Chicago City Council made detailed findings, after legislative hearings, that *loitering by criminal street gang members* causes particular, identifiable harms. *See supra* at 9. These detailed findings—which were not questioned by the court below, *see* Pet. App. 2a-3a, 16a-17a, and which are not reasonably subject to question—formed the basis of the City Council's policy decision to authorize police officers to issue dispersal orders only to those groups of loiterers that officers have probable cause to believe contains at least one criminal street gang member. Nothing in *Papachristou* or in the Constitution requires the City Council to narrow police discretion further by identifying in advance some "subset" of gang members who should be permitted to loiter.

c. The Ability of Individual Officers To Issue Dispersal Orders Is Further Limited By The Applicable Implementing Regulations

In any event, if further narrowing were required, it is

more than adequately supplied by the Chicago Police Department's General Order 92-4. As set forth in detail above, *see supra* at 10-11, the Order imposes further significant restrictions on the discretion of members of the Department to enforce the ordinance by, *inter alia*, requiring that enforcement be limited to specific gangs that have been identified, based upon reliable information, as operating in Chicago; requiring that determinations concerning gang membership may only be made on the basis of certain specified types of reliable information, and not on the basis of generally available clothing alone; limiting the areas in which the ordinance can be enforced to those where gangs are active; and limiting the class of officers who are authorized to enforce the ordinance. Pet. App. 65a-71a. These additional restrictions further narrow significantly the discretion of individual officers to issue dispersal orders, and they further ensure that enforcement efforts will be targeted to the specific problem at hand—the congregation of members of identifiable criminal street gangs in neighborhoods where gang violence and other gang-related activities have become a menace to the community. Indeed, the additional restrictions of the Order are so significant that, under this Court's precedents as discussed above, it is impossible to reach any conclusion other than that respondents' vagueness challenge must fail. *Cf. Grayned*, 408 U.S. at 114 ("As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible.").

The Illinois Supreme Court did not dispute the foregoing; rather, it refused to consider the General Order *at all*. The court below held that consideration of the order was improper in evaluating a vagueness challenge because "lawmakers may not abdicate their responsibilities for setting the standards of the criminal law" and because "[i]t is the duty of the lawmakers to establish minimal guidelines to govern law enforcement." Pet. App. 15a-16a. This conclusion is plainly in error.

This Court long has held that "'[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court *or enforcement agency* has proffered.'" *Ward* v. *Rock Against Racism*, 491 U.S. 781, 795-96 (1989) (quoting *Hoffman Estates*, 455 U.S. at 494 n.5) (emphasis added). Indeed, in *Hoffman Estates*, this Court rejected a vagueness challenge to a city ordinance targeting purveyors of drug paraphernalia, precisely because the ordinance—*read together with enforcement guidelines promulgated by the local police department*—sufficiently channeled the discretion of the enforcement officers to defeat a facial vagueness challenge. *See* 455 U.S. at 499-504. The lower court erred in failing to consider the Order in deciding respondents' vagueness challenge, and, in light of the Order, that challenge undoubtedly fails.[6]

d. The Ordinance Provides Adequate Notice to Citizens of The Conduct It Requires

The second sentence of § 8-4-015(a) of the ordinance makes it an offense for any person to whom a dispersal order has been issued to fail promptly to obey the order. Pet. App. 61a. This provision is not impermissibly vague.

As noted earlier, an enactment that imposes obligations on a citizen must be sufficiently clear in two senses: it must define its prohibitions "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and

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[6] The lower court's construction of federal vagueness doctrine as requiring that the narrowing of discretion be done entirely by the city's legislature, rather than by one of its executive agencies, also runs afoul of this Court's repeated admonition that the Constitution does not impose upon States a requirement of separation of powers. *See Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 612-13 (1937). Moreover, even within the federal system of separation of powers, Congress has the power to impose criminal sanctions for violation of administrative regulations, even if those regulations have been promulgated by the agency charged with criminally prosecuting persons who violate them. *Touby* v. *United States*, 500 U.S. 160, 167-68 (1991).

discriminatory enforcement." *Kolender*, 461 U.S. at 357. The only provision of the ordinance that defines a standard of conduct for citizens is the second sentence of § 8-4-015(a), which provides that when a dispersal order is issued to a group of persons under the ordinance, those persons must "remove themselves from the area." Pet. App. 61a.

There is nothing ambiguous about this standard, and the Illinois Supreme Court did not contend otherwise. Indeed, any such claim is squarely foreclosed by this Court's precedents. This Court has previously held that a requirement that a person "move on" when ordered to do so by an officer "is narrow and specific." *Cox* v. *Louisiana*, 379 U.S. 536, 551 (1965) ("*Cox I*"); *see also Colten v. Kentucky*, 407 U.S. 104, 110 (1972) (rejecting vagueness challenge to ordinance that required persons congregating with the intent to cause inconvenience, annoyance, or alarm to comply with a police order "to disperse"). Moreover, the validity of the ordinance's geographical standard, which requires persons to remove themselves "from the area," is confirmed by other decisions of this Court rejecting vagueness challenges to enactments with comparable geographical elements. *See Grayned*, 408 U.S. at 111 & n.17 ("adjacent" to a school is not vague); *Cox* v. *Louisiana*, 379 U.S. 559, 568-69 (1965) ("*Cox II*") ("near" a courthouse is not vague); *see generally Boos*, 485 U.S. at 331.[7]

The Illinois Supreme Court nonetheless concluded that the ordinance failed to provide adequate notice to citizens. Pet. App. 13a. The ordinance was deficient in this regard because, in the court's view, the standards for issuing a

[7] For the same reasons, the geographical standard set forth in the ordinance provides sufficient guidance by which an officer can objectively determine whether a citizen has complied with the dispersal order. As such, the Chicago ordinance avoids the defects of the statute at issue in *Kolender*, which, by requiring citizens to provide "credible and reliable" identification during an investigatory stop, vested "virtually complete discretion in the hands of the police to determine whether the suspect ha[d] satisfied the statute." 461 U.S. at 358.

dispersal order failed adequately to apprise citizens of the circumstances that will lead to the issuance of such an order: "An individual standing on a street corner with a group of people has no way of knowing whether an approaching police officer has a reasonable belief that the group contains a member of a criminal street gang." *Id.* at 11a-12a. This conclusion rests on a fundamental misapprehension of the requirements of vagueness doctrine.

As explained above, the standards set forth in the Chicago ordinance are sufficiently clear to cabin the discretion of individual officers to issue such orders. *See supra* at 13-23. Moreover, because the ordinance and the General Order are published, the citizens of Chicago are on notice that dispersal orders may be issued under the criteria set forth in the ordinance. The Illinois Supreme Court went further, however, and held that, in addition to narrowing the discretion of police officers, informing the public at large of the applicable standards under which dispersal orders may be issued, and providing clear guidance concerning the conduct required by a dispersal order, the ordinance must also, in effect, ensure that a citizen has a sufficient factual basis to permit him or her to evaluate whether the order has been properly issued.

This latter requirement finds no support whatsoever in the cases of this Court. Indeed, any such requirement is foreclosed by *Boos* v. *Barry*, in which this Court addressed a statute that had been construed to permit police officers to issue dispersal orders within the vicinity of an embassy, but only where "'the police *reasonably believe* that a threat to the security or peace of the embassy is present.'" 485 U.S. at 330 (citation omitted) (emphasis added). It is apparent that, as the Illinois Supreme Court observed with respect to the Chicago ordinance, this "reasonable belief" standard of the *Boos* statute often will be satisfied based in whole or in part upon information known to the officer issuing the dispersal order but *not* known to the person to whom the order is issued. Thus, for example, the officer

may know that the embassy is presently hosting its head of state, who has been the subject of credible death threats; or that the embassy at that moment has a large number of guests inside; or that the rear fire door to the embassy is temporarily stuck shut; or that the ambassador is inside recovering from a recent operation. Even though the statute, as construed, obviously permitted police officers to rely upon such undisclosed factors in issuing dispersal orders outside embassies, this Court found it sufficient that the statute, in general language "of common understanding," provided objective standards to channel the discretion of individual officers. 485 U.S. at 332. Nothing in the Court's opinion suggests that, in addition to meeting these requirements, an enactment must also provide a basis by which a citizen may independently verify the propriety of a particular dispersal order.

Moreover, the novel notice requirement imposed by the Illinois Supreme Court in this case defies common sense and is hopelessly unworkable. Under the lower court's reasoning, a person could not be prosecuted for resisting arrest unless he or she was first apprised of the information that led the officer to order the person to submit to arrest. Just as the lower court was concerned that a dispersal order might be based on a mistaken belief, rooted in facts known only to the officer, that a group of loiterers contains a criminal street gang member, so too a police officer's decision to effect a warrantless arrest might in some cases be based upon a probable cause determination derived from information unknown to the arrestee. But it has never been thought that the Constitution forbids a State from requiring compliance with a police officer's order of arrest, even if it later turns out that the officer lacked probable cause. *See, e.g.*, *People* v. *Curtis*, 70 Cal. 2d 347, 352-53 (1969) (rejecting due process and Fourth Amendment challenges to California statute prohibiting forceful resistance to unlawful as well as lawful arrests).

In any event, it is simply untrue that, as Respondents

have asserted, "the ordinance here provides no guidance for avoiding a police order to disperse in the first place." Brief in Opp. for Morales Resps. 13. A citizen who desires to avoid receiving a dispersal order can generally do so by refraining from loitering with criminal street gang members in Chicago. That an officer might nonetheless issue a dispersal order based on a reasonable but erroneous belief that a group of loiterers contains a gang member does not render the ordinance vague. Indeed, if that were true, the *entirety* of the criminal law would be vague: the fact that a citizen might attempt to follow every law scrupulously does not eliminate the possibility that, in a particular set of circumstances, an officer might nonetheless reasonably but mistakenly conclude that probable cause to arrest exists.[8]

C. The Ordinance is Fully Consistent With this Court's "Substantive Due Process" Jurisprudence

The court below also invalidated the ordinance on the ground that it violates "substantive due process." Pet. App. 19a. In reaching this conclusion, the court first stated that the freedom to engage in "harmless activities" such as "loafing, loitering, and nightwalking" is "an aspect of the personal liberties protected by the due process clause." *Id.* at 17a-18a (citing *Papachristou*). The court held that, by requiring groups of loiterers containing probable gang members to comply with an order to move on, the ordinance implicates the "personal liberty interests" in freedom of movement and in associating with others. *Id.* at 18a. The lower court, however, did *not* characterize these "liberty

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[8] Respondents' assertion that the ordinance is somehow unique or infirm because it "elevate[s] an officer's reasonable suspicion or probable cause into an element of the offense," Brief in Opp. for Morales Resps. 14, is even more wide of the mark. Statutes that make it a crime to resist a lawful arrest often require, as an element of the offense, a showing that the arresting officer had probable cause to make a warrantless arrest. *See, e.g.*, California Jury Instructions, Criminal §16.104 (West 6th ed. 1996) (defining "lawful arrest" to include warrantless arrests made with "reasonable cause," and defining "reasonable cause").

interests" as being "fundamental rights" whose infringement would have to be justified under "strict scrutiny," *cf. Reno* v. *Flores*, 507 U.S. 292, 301-02 (1993); on the contrary, the court considered only whether the ordinance "intrude[d] upon [these] personal liberties arbitrarily or in an utterly unreasonable manner." Pet. App. 18a.

Applying this standard, the court held that the ordinance was "arbitrary" in two respects. First, the court held that it was arbitrary to apply the ordinance to persons whom the police had probable cause to believe were gang members but who were not *actually* gang members. *Id.* Second, the court found it arbitrary that the ordinance was "aimed at persons based merely on the suspicion that they may commit some future crime." *Id.* Both of these conclusions were erroneous.[9]

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[9] Because the court thus held that the ordinance was arbitrary, it declined to consider whether the ordinance infringed "fundamental rights." *Id.* at 19a. It is clear, however, that the ordinance does not do so. This Court has made clear that such rights include only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington* v. *Glucksberg*, 117 S. Ct. 2258, 2268 (1997) (citations omitted). This Court has recognized as "fundamental" in this sense "certain basic matters of procreation, marriage, and family life,"*Kelley* v. *Johnson*, 425 U.S. 238, 244 (1976), but quite obviously none of those rights is implicated here. Moreover, although this Court long has recognized a right to travel from state to state and abroad, *see Kent* v. *Dulles*, 357 U.S. 116, 125-26 (1958); *Edwards* v. *California*, 314 U.S. 160, 178 (1941), and has at times referred more loosely to a "constitutional right to freedom of movement," *see Kolender*, 461 U.S. at 358; *Kent*, 357 U.S. at 126, it is clear that there is no generalized fundamental right to be free of restrictions upon one's physical movement. *See, e.g., Hutchins* v. *District of Columbia*, 1998 U.S. App. LEXIS 10303 at *80 (D.C. Cir. May 22, 1998) (Silberman, J., dissenting) ("[S]uch a broad assertion would lead to somewhat ridiculous results—for example, installing a traffic light would trigger strict scrutiny."). Nor does the ordinance implicate fundamental rights of association. *See City of Dallas* v. *Stanglin*, 490 U.S. 19, 24 (1989) (holding that the "right of association" as a "fundamental element of personal liberty" extends only to "certain intimate human relationships"). Finally, nothing in *Papachristou* creates a "fundamental right" to loiter on the streets under the circumstances addressed by the Chicago ordinance. Although Justice Douglas' colorful opinion in that case refers to the "amenities of life" as including loafing, wandering, and strolling, 405 U.S. at 164, nothing in the opinion suggests that government limitations on these "amenities" would be subject to "strict scrutiny."

Even assuming *arguendo* that the lower court was correct in concluding that the ordinance implicates liberty interests that comprise a "substantive component of the Due Process Clause" protected against "arbitrary" governmental action," judicial restraint still dictates that the interests so recognized be carefully defined. *Collins* v. *City of Harker Heights*, 503 U.S. 115, 125-26 (1992). Here, the proper description of the right asserted by respondents is at best a narrow one—the right to remain in a public place after having been asked to move on by an officer who reasonably believes that the group of loiterers asked to move on includes at least one member of a criminal street gang. For several reasons, the ordinance does not arbitrarily infringe the liberty interests asserted here, however defined.

First, the burden imposed by the ordinance is relatively modest. All that a citizen needs to do to comply with the ordinance is to move on when requested to do so. If the citizen desires to associate with criminal gang members, he may continue to do so simply by moving indoors, or by refraining from loitering.

Second, the ordinance clearly serves a valid and legitimate state interest. The City of Chicago reasonably concluded, based upon numerous studies of the matter, that gang loitering was intimidating to residents and contributed significantly to increased levels of violence. Although the court below found it distasteful that the City Council specifically targeted gang members on the supposition that "they may commit some future crime," Pet. App. 18a, there is simply no authority for the view that a local legislative body, in the exercise of its police powers, may not regulate behavior—such as gang loitering—that it finds to be *both*

harmful in its own right (because it intimidates neighborhood residents and reduces property values) *and* likely to lead to the commission of more serious crimes.

Third, the ordinance and General Order are anything but arbitrary in the manner in which they target the problem of gang activity in Chicago's neighborhoods. As noted above, the ordinance goes directly to the problem at hand—the congregation of groups of gang members and others loitering without apparent purpose. The lower court believed it was "arbitrary" not to limit the applicability of the ordinance to *actual* gang members (as opposed to those whom the police have probable cause to believe are gang members), Pet. App. 18a, but it cited no authority for this view. Moreover, as explained above, *supra* at 26-27, police officers are regularly required to make probable cause determinations with respect to a wide variety of matters, and the fact that such a system tolerates errors—someone may be lawfully arrested who is in fact innocent—does not render it arbitrary.

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Dated: June 19, 1998 Respectfully submitted,

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AMICUS CURIAE

BRIEF

(13)

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In the Supreme Court of the United States

OCTOBER TERM, 1997

CITY OF CHICAGO,

Petitioner,

v.

JESUS MORALES, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF THE CHICAGO NEIGHBORHOOD ORGANIZATIONS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Chicago's gang loitering ordinance, which enjoys the overwhelming support of citizens who share in the burdens as well as the benefits of the law, and which was adopted because it has a significantly less destructive impact on gang members and their communities than do alternative law-enforcement policies, strikes a reasonable and constitutional balance between liberty and order.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Amici— collectively, "the Neighborhood Groups" — are 20 civic, religious, and other community associations from throughout Chicago.[2] Working closely with their elected representatives on the City Council, the Neighborhood Groups played a critical role in the design of the gang-loitering ordinance ("the Ordinance"). Because the Ordinance's implementing regulations oblige the police

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[1] The parties have consented to the filing of this brief. Copies of the consent letters have been lodged with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae*, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

[2] *Amici* include: United Neighborhood Organization, a nonprofit organization whose focus is economic development, school reform, and civic participation; Southwest Neighbors Against Gangs, a southwest side community organization whose efforts include aggressive graffiti removal and active Nite Patrol; West Woodlawn Council of Block Clubs, representing roughly 75 block clubs in Woodlawn; Hegewisch Community Committee, a 60-year-old organization working to prevent juvenile delinquency; Chicago Roseland Coalition for Community Control, an economic development corporation of 24 years in Roseland; South Chicago Chamber of Commerce, representing 275 area businesses, churches, and school and community groups; Ravenswood Community Council, dedicated to housing, youth, senior programs, and community safety; Nobel Neighbors, an organization committed to improving living conditions in West Humboldt Park; Hermosa Community Organization, an organization addressing escalating neighborhood crime and providing tuition support for area children; Reach Out & Touch Ministries, working to provide at-risk youth in Englewood with job opportunities; West Humboldt Park Family & Community Development Council, a community-based group committed to housing, economic development, and neighborhood safety; Bethel New Life, working to increase the quality of life in East & West Garfield Park through crime prevention and economic development; Crime Stoppers, an Englewood organization directed at controlling conditions that foster crime; Lawndale Business & Local Development Council, representing 66 local businesses working to create jobs on Chicago's west side; CARE, rehabilitating homes, removing graffiti, and promoting neighborhood safety; Near Westside Community Development Corporation, a "bottom up" planning movement aimed at neighborhood development and self-sufficiency; Edgewater Community Council, which focuses on housing and public safety issues; Emmaus Ministries, an outreach to young men involved in high-risk street activity including gangs, prostitution, and substance abuse; Walls Community Church, a west side church committed to urban life and the poor; Circle Urban Ministries, which operates youth development and shelter programs in the Austin community.

to consult with community associations, the Neighborhood Groups have also been intimately involved in determining where and how the Ordinance is enforced. Finally, the Neighborhood Groups have played an active role defending the Ordinance, filing *amicus* briefs in the Illinois Court of Appeals, the Illinois Supreme Court, and in support of the petition for certiorari.

The interest of the Neighborhood Groups can be simply stated: to be heard. No other group of citizens is in a better position to address the practical impact of the Ordinance. The Groups' members are the ones who daily face a heightened risk of criminal victimization from gang criminality, and who experience first-hand the destructive impact of gangs — and more severe means of abating gangs — on the lives of their communities. The Groups are the mothers and fathers, the sisters and brothers, and the neighbors and friends of the youths subject to the law. They support the Ordinance because it is a form of policing that secures order *without* destroying the lives of community youth who find themselves enmeshed in the complex social and economic forces that fuel gang criminality.

From the outset, those who have opposed the Ordinance have dismissed the unique perspective of the Neighborhood Groups' members as irrelevant. An exchange from the City Council hearings on the Ordinance typifies the critics' attitude. At the hearings, dozens of residents — from church leaders, to representatives of local neighborhood associations, to ordinary citizens — testified in favor of the proposed law. Harvey Grossman, Director of the Illinois ACLU, testified against it:

> I am a lawyer, and I spend a great deal of time doing nothing more than reviewing ordinances and statutes, and it turns into a little bit of a long exam game. * * * We pick apart the statute. We focus on [a] word or [a] phrase, and we try to say why that phrase might or might not be constitutional.

Supp. R. II at 107. Alderman William Beavers, a Council member who represents a ward on Chicago's south side, objected to this bookish conception of how to appraise the constitutionality of the law. "I don't know if you are attuned to what's going [on] in these neighborhoods," he told Grossman. "Maybe I need to take you out there and show you what's really going on." *Id.* at 119. To which Grossman replied that that would not be necessary:

> I think our ability to come together and to try to resolve issues [like this] really doesn't * * * depend on if I see what's happening in your neighborhood or you see what's happening in my neighborhood.

Id. at 120. Rather, what it does depend on, he stated (*ibid.*), is

> empathy or ability to understand what's happening to other people and, two, some commitment, some intellectual integrity and some commitment to principle. And the principle that I am suggesting to you is inviolate. It doesn't change.

The Neighborhood Groups submit that this conception of how to assess the constitutionality of the Ordinance is just plain wrong. We do not deny that the Ordinance poses challenging issues. But we do deny, emphatically, that those issues — bearing as they do on the proper balance of liberty and order in *our* communities — can adequately be considered from the perspective of someone who does "nothing more" than "pick apart" statutes and ordinances for a living. We vehemently contest the suggestion that these issues can fairly be resolved by a formulaic application of "inviolate" "intellectual" "principle[s]" that "do[]n't depend," "really," on "see[ing] what's happening in [our] neighborhood[s]." And most important of all, we indignantly resist the characterization of the complex issues in this case as one big "exam game." *Ibid.*

The fate of the Ordinance is *not* a "game" for members of the Neighborhood Groups. The goal of this brief is to show that their perspective *is* constitutionally relevant and to explain why, in their

view, the Ordinance strikes a constitutionally permissible balance between liberty and order.

SUMMARY OF ARGUMENT

I. Courts should adjust the level of constitutional scrutiny applied to a policing technique based on the breadth of its impact on liberty within the community. The proposition that courts should reserve the highest degree of scrutiny for laws that concentrate burdens on politically disempowered minorities figures prominently across a wide expanse of doctrines. The exacting scrutiny associated with this Court's Due Process vagueness jurisprudence reflects the assumption that communities never share in the burden on liberty associated with public order laws, the incidence of which is predictably concentrated on minority citizens.

That perception accurately captured the political reality of the 1960s and early 1970s, when this Court's leading criminal procedure precedents were established. Today, however, minority citizens are no longer so disenfranchised, and in fact exercise significant authority in the Nation's inner-cities. They are *using* their new-found political power to secure effective law enforcement in the form of anti-loitering laws, curfews, and order-maintenance policing.

It makes little sense to approach the constitutional questions posed by these laws as if they were the same ones posed by an earlier generation of public order provisions, the purpose and effect of which were to oppress minorities. Rather than subject all such laws to searching scrutiny, courts should consider whether the community at large is meaningfully sharing in the burden created by the challenged provision. If it is, courts should afford significant weight to the judgment of the community's political representatives that the subject law reasonably balances liberty and order.

II. The Ordinance affects members of the community at large in a meaningful way. Unlike the anti-loitering laws of an earlier

generation, the Ordinance is *not* a tool of repression being used by white majorities to reinforce the exclusion of minorities from the community's political and economic life. To the contrary, representatives of Chicago's poorest minority communities have played a key role in the adoption and implementation of this law. The residents of those communities, moreover, are linked by strong social and familial ties to the gang members against whom the Ordinance is enforced. It is precisely because they care so deeply about the welfare of these persons that residents favor the relatively mild gang-loitering law as an alternative to draconian penalty enhancements for gang crimes, severe mandatory minimum prison sentences for drug distribution, and similarly punitive measures. The pervasive sense of "linked fate" between the majority of these communities' residents and the youths affected by the Ordinance provides a compelling reason to respect the community's determination that such measures enhance rather than detract from liberty in their communities.

III. Evaluated under an appropriately deferential standard of review, the Ordinance strikes a reasonable balance between liberty and order. Like other forms of order-maintenance policing, the Ordinance promotes obedience to law primarily through its positive effect on community social norms. Suppressing visible displays of gang authority counteracts the social pressures that drive many youths to join or emulate gang members. It also provides assurance to committed law-abiders, who are more likely to cooperate with each other and with the police when insulated from relentless public intimidation by gang members. At the same time, the guidelines established by the Ordinance's implementing regulations, combined with the ongoing role of community organizations in overseeing its implementation, furnish potent safeguards against abusive enforcement. Indeed, the Ordinance represents a significantly *less coercive* alternative to conventional law-enforcement strategies for combating gangs, and even to other forms of order-maintenance policing, which afford police officers considerably more discretion in enforcement.

ARGUMENT

I. THE GENERALIZED IMPACT OF A POLICING TECHNIQUE ON MEMBERS OF THE COMMUNITY IS RELEVANT TO THE LEVEL OF JUDICIAL SCRUTINY

Applying this Court's decisions in *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972), and *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87 (1965), the Illinois Supreme Court held that the Ordinance was unconstitutionally vague. We submit that the court fundamentally misconceived the rationale, and hence the proper reach, of those decisions. The exacting demand for statutory precision reflected in those cases is reserved for discretionary policing techniques the coercive incidence of which is concentrated on a politically disempowered minority. When the policing technique affects the community generally, in contrast, courts appropriately relax the degree of scrutiny in recognition of the community's own incentives to police its police.[3]

This Court commonly describes constitutional rights — particularly those that relate to criminal justice — as guaranteeing a reasonable "balance * * * between liberty and order." *E.g.*, *Medina* v. *California*, 505 U.S. 437, 443 (1992). In determining whether the balance struck by any particular policy is reasonable, courts appropriately pay attention to how diffusely the impact of that policy is felt within the community. Where the coercive incidence of a particular policy is being visited on a powerless minority, popularly elected representatives lack adequate incentives to determine whether the order benefits of the law for the community at large truly outweigh the liberty costs to the few. See generally *United States* v. *Carolene Products Co.*, 304 U.S.

[3] The court below also held that the Ordinance violated substantive due process. We dispute that ruling on the same ground — namely, that in undertaking to enforce its own conception of liberty, the court applied a degree of scrutiny inconsistent with the deference that is due when the law in question does not concentrate burdens on a disempowered minority but rather affects members of the community generally.

144, 152 n.4 (1938); J. Ely, *Democracy and Distrust* 73-104 (1980). This explains why courts strictly scrutinize policies that discriminate on the basis of race, restrict "dangerous" speech, or impose special obligations on account of religion. See M. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 Va. L. Rev. 747, 748-57, 760-63 (1991).

But when a community can be seen as *internalizing* the coercive incidence of a particular policy, courts are much less likely to second-guess political institutions on whether the tradeoff between liberty and order is appropriate. Thus, the Free Exercise Clause proscribes "'prohibition[s] that society is prepared to impose upon [religious minorities] but not upon itself'" (*Church of Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 545 (1993)), but does not affect "neutral law[s] of general applicability" resulting from the normal "political process" in our "democratic government" (*Employment Division* v. *Smith*, 494 U.S. 872, 879, 890 (1990)). Likewise, this Court has readily sustained free speech challenges to taxes that "single[] out the press," reasoning that "the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened" in such circumstances, while rejecting free speech challenges to taxes of general applicability, reasoning that there is little cause to "fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency." See *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (invalidating a tax targeted at the press); *cf. Leathers* v. *Medlock*, 499 U.S. 439, 447 (1991) (sustaining a generally applicable sales tax as applied to the press).

These principles apply broadly in constitutional law. For instance, in challenges to state laws pursuant to the Dormant Commerce Clause, the Court carefully scrutinizes laws whose "burden falls principally upon those without the state," simply because such laws are "not likely to be subjected to those political

restraints which are normally exerted on legislation where it affects adversely some interests within the state." *South Carolina State Hwy. Dep't* v. *Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938). Similarly, the Takings Clause principally "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)), but does not limit land-use regulations that impose equal burdens on all property owners (see *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 486 (1987)). Even the Court's standing cases reflect the notion that the generality of a burden is important in determining what role (if any) the judiciary should play in its redress. As the Court explained just a few days ago in *Federal Election Commission* v. *Akins*, 118 S. Ct. 1777, 1785 (1998), "where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance."

The constitutional doctrines that regulate policing reflect the same emphasis on how burdens are apportioned. Normally, the police must obtain a warrant, supported by probable cause, before they can conduct a search. See, *e.g.*, *Coolidge* v. *New Hampshire*, 403 U.S. 443, 449-50 (1971). This requirement recognizes that law-enforcement officials are not likely to attach sufficient value to the liberty of individual criminal suspects, whose interests are generally a matter of indifference to the general public. See *ibid.*; *cf.* Ely, *supra*, at 96-97. Law-enforcement officials need not obtain a warrant or even have probable cause, however, to stop motorists at sobriety checkpoints (see *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444 (1980)), or to search all persons entering airports or government buildings (see *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 675 n.3 (1989)). Insofar as these policies burden average members of the community, there is far less reason for courts to doubt the determination of politically accountable officials that these policies strike a fair balance between liberty and order. See S. Wasserstrom

& L. Seidman, *The Fourth Amendment As Constitutional Theory*, 77 Geo. L.J. 19, 95-96 (1988).

If the burden of a law-enforcement policy falls on someone other than the average citizen, deference is still due so long as the political process can be viewed as sufficiently attentive to that party's interests. Thus, random drug-testing of student athletes is exempted from the warrant requirement not because *student athletes* exercise significant influence in the political process but because their *parents*, who naturally take their children's interests to heart, do. See *Vernonia Sch. Dist.* v. *Acton*, 515 U.S. 646 (1995). Likewise, searches of regulated commercial enterprises, which exert considerable influence in the political process, and which pass the cost of regulation onto consumers, are exempt from the warrant requirement under the "administrative search" doctrine. See, *e.g.*, *New York* v. *Burger*, 482 U.S. 691 (1987); W. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 Mich. L. Rev. 1016, 1044-45 (1995).

There is no reason to approach the Due Process constraints on policing any differently. The "void for vagueness" doctrine permits "reasonable breadth" in statutory drafting in order to accommodate the need for "flexibility" in law enforcement and the interest of citizens in avoiding "arbitrary and discriminatory application." *Grayned* v. *City of Rockford*, 408 U.S. 104, 109-10 (1972); see *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340 (1952) (Constitution demands only "a reasonable degree of certainty" in light of "untold and unforeseen variations in factual situations"). Just how precise the language of a statute must be to be "reasonable" should depend on how widely the burden of that law is likely to be felt within the community.

Papachristou and *Shuttlesworth* reflect the exacting degree of precision that courts appropriately demand when the burdens of community policing are being concentrated on politically disadvantaged minorities. Well into the 1960s, discretionary law enforcement authority was a central means by which communities

in both the North and South excluded minorities from economic and political life.[4] *Shuttlesworth* and *Papachristou* both arose from this factual context, as did a variety of other landmark criminal procedure precedents.[5] Because those arrested under the public order laws of the era typically came "from minority groups" with insufficient political clout "to protect themselves" and without "the prestige to prevent an easy laying-on of hands by the police," it would have been absurd, the author of *Papachristou* observed, for courts to defer to the judgment of the community's political institutions on whether those forms of policing embodied a reasonable balance of liberty and order. W. Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 1, 13 (1960).

It would be a mistake, however, to assume that the conditions that informed *Papachristou* and *Shuttlesworth* are immutable. For one thing, as a result of the Voting Rights Act of 1965, 42 U.S.C. § 1971 *et seq.*, African-Americans are no longer so disenfranchised, and in fact exercise considerable political influence, particularly in the Nation's inner-cities.[6] Nor is the relationship

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[4] See R. Kennedy, *Race, Crime, and the Law* ch. 3 (1997); C. Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820, 839-40 (1994); D. Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551, 595-601 (1997).

[5] At issue in *Shuttlesworth* was the application of a loitering ordinance to a "'notorious' • • • civil rights" activist at a time when African-Americans were engaged in picketing and boycotting of businesses that discriminated on the basis of race. See 382 U.S. at 101-02 (Fortas, J., concurring). *Papachristou* involved the application of such a law to two interracial couples sitting in a parked car. See 405 U.S. at 158-59. See also *Cox v. Louisiana*, 379 U.S. 536 (1965) (invalidating conviction obtained under vaguely worded statute as applied to protesting civil rights demonstrators); *Bouie v. South Carolina*, 378 U.S. 347 (1964) (same). See generally K. Pye, *The Warren Court and Criminal Procedure*, 67 Mich. L. Rev. 249, 256 (1968), and Steiker, *supra*, at 844.

[6] On the dramatic effects of the Act on minority registration, turnout, and representation, see *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (C. Davidson et al. eds., 1994). On the increase of African-
(continued...)

between minorities and police marked by the unbridled animosity that furnished the backdrop for *Papachristou* and *Shuttlesworth*. Due in large part to the increased political representation of minorities, African-Americans today make up a significant percentage of all urban police departments.[7] New York, Washington, D.C., and Los Angeles, for example, have all had black police chiefs accountable to black mayors.

Indeed, rather than shunning the police, African-Americans are now using their political strength to remedy the historic *under-enforcement* of law in their communities. In nearly every large American city, African-Americans have supplied the impetus for the revival of community policing. African-American community groups (including the Urban League) were the driving force behind the adoption of curfews in cities such as Miami, Dallas, San Diego, and Washington, D.C.[8] African-American city council

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[6](...continued)
American representation in elected offices at all levels of government, see Joint Ctr. for Political & Economic Studies, *Black Elected Officials: A National Roster* (1993); Joint Ctr. for Political Studies, *Black Elected Officials: A National Roster* (1984); see also S. Lawson, *Running for Freedom: Civil Rights and Black Politics in America Since 1941*, at 170-182 (1991) (detailing progress of Black urban politicians and noting triumphs of candidates in Newark, Oakland, New Orleans, Atlanta, Detroit, and Gary among other cities).

[7] Consider the "index of black representation," which is calculated by dividing the percent of African-American police officers in a department by the percent of African Americans in the local population of several major cities. Los Angeles's index increased from .55 to 1.00 between 1983 and 1992. Detroit's index increased from .49 to .70 during the same period. Chicago, San Diego, Dallas, and Phoenix posted indexes of .64, .80, .64, .77 in 1992, respectively, each an increase from 1982 levels. See Sourcebook of Criminal Justice Statistics Table 1.36 at 49 (K. Maguire et al. eds. 1994).

[8] See *All Things Considered: Miami Curfew Gaining Support Among Many Black Groups* (National Public Radio broadcast, Feb. 24, 1994) (reporting that curfew ordinance sponsored by African-American County commissioner is supported by 70% of African-Americans in Dade County and by Greater Miami Urban League); *The Teen Curfew Works* (editorial), San Diego Union-Tribune, Aug. 7,
(continued...)

members, representing the city's most crime-ridden districts, were instrumental in the enactment of the Chicago's Ordinance. See pp. 14-16, *infra*. African-Americans have also strongly supported the use of anti-loitering laws in other cities, as well as the renewed attention to order-maintenance policing in New York.[9]

The relationship between the political supporters of these laws and those at whom those laws are aimed also distinguishes the new community policing from the old. Unlike the 1960s, today there is no natural antagonism between the supporters of community policing and those who bear the coercive incidence of curfews, anti-loitering laws, and the like. On the contrary, these two groups are intimately linked by strong emotional, social, and even familial ties. In fact, many inner-city residents support anti-loitering laws and curfews precisely because they see them as tolerably *moderate* alternatives to the draconian punishment of minor drug offenses.[10]

The idea that the resurgence of public order laws signals a return to the discriminatory and arbitrary policing that motivated *Papachristou* completely misconceives the political reality. These

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[8](...continued)
1994, at G2 (minority community support for San Diego curfew); B. Clements, *Views Differ on Dallas' Curfew, Which Spawned Tacoma's Plan*, News Trib. (Tacoma, Wash.), Oct. 17, 1994, at B1 (same, Dallas curfew); T. Locy, *D.C. Curfew Overturned in Federal Court*, Wash. Post, Oct. 30, 1996, at A1 (Washington, D.C. curfew sponsored by African-American council member and supported by African-American Mayor).

[9] See Livingston, *supra*, at 623 ("Loitering legislation in the 1990s has often had broad community support, particularly in some predominantly minority communities plagued by street-level drug dealing."); B. Harden, *Letter from New York: "Ideal State of Cleanliness" Is Apple of Giuliani's Eye*, Wash. Post, Mar. 23, 1998, at A6 (reporting majority of city's African-Americans support Mayor Giuliani based on perception that his emphasis on "civility" is responsible for steep drops in crime in poor, minority neighborhoods).

[10] See T. Meares, *It's a Question of Connections*, 31 Val. U. L. Rev. 579, 588-89 (1997); T. Meares, *Social Organization and Drug Law Enforcement*, 35 Am. Crim. L. Rev. 191, 211-17 (1998).

new public order laws "are not facially aimed at rendering some people, like racial minorities, transients, and the poor, outsiders to the community." Livingston, *supra*, at 594. Rather, they are part and parcel of minority communities' efforts to restore community organization. Meares, *Social Organization*, *supra*, at 224-26.[11]

Because the circumstances surrounding the adoption and enforcement of public order laws can vary, constitutional doctrine should not presume that all such laws are of a piece. The most straightforward way for the Due Process vagueness doctrine to take account of the relevant differences in such laws is through the burden-internalization principle that informs constitutional jurisprudence in so many other settings. Thus, rather than subject all public order laws to the searching scrutiny embodied in *Papachristou* and *Shuttlesworth*, courts should first ask whether the community itself is sharing in the burden that that law imposes on individual freedom. Relevant indications are the purposes served by the law (see *Church of the Lukumi Babalu Aye*, 508 U.S. at 545-46), the relationship between supporters of the law and those to whom it is being applied (see *Vernonia School Dist.*, 515 U.S. at 649-50, 665), and the availability of administrative procedures aimed at guaranteeing effective political oversight of the exercise of discretion (see Livingston, *supra*, at 653-58). If, on this basis, a court concludes that a law's impact on liberty is being widely felt

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[11] Not surprisingly, when civil libertarians challenge curfews, anti-loitering laws, and like forms of order-maintenance policing as inviting racial harassment, their lawsuits are frequently *opposed* by minority citizens themselves. See, *e.g.*, Clements, *supra*, at B1 (quoting African-American mother who spear-headed support for Dallas curfew: claim that curfew would lead to racial harassment "was an ACLU scare tactic that polarized the community"); R. Conner et al., *Listen to the Voice of the Projects* (letter to the Editor), N.Y. Times, Apr. 15, 1994, at A30 (noting that residents of Chicago housing projects sought legal representation to oppose ACLU class action brought on residents' behalf); Sen. U. Curie, *The ACLU Pits the Civil Rights of Few Against the Common Good* (Letter to Editor), Wash. Times, Nov. 30, 1996, at A12 (comment of African-American legislator on ACLU opposition to curfews: "the ACLU seem[s] to be marching to music only it c[an] hear").

within the community, it should afford that law greater deference, in recognition of the community's own considered judgment that it appropriately balances liberty and order.

II. THE BURDENS ON LIBERTY ASSOCIATED WITH THE ORDINANCE AFFECT MEMBERS OF THE COMMUNITY GENERALLY

This Court's jurisprudence reserves the strictest scrutiny for police practices that concentrate burdens on individuals who are excluded from the political process and whose interests are not otherwise adequately represented by members of the community at large. That situation does *not* describe the Ordinance. Rather, the day-to-day impact of the Ordinance has been felt generally by the citizens of affected neighborhoods, who are intimately connected to the city's gang members, and who support the law because it is the *least coercive* means of protecting themselves, their children, and their neighbors from the scourge of gang criminality.

Unlike the public order provisions scrutinized by this Court in the 1960s, the Ordinance was not imposed on minorities by an alien political establishment; rather, it was enacted at the behest of those very citizens. Members of the Neighborhood Groups, as well as many other grassroots organizations from the poorest and most crime-ridden minority neighborhoods in the city, played a critical role in the Ordinance's adoption and implementation.[12] The Chicago City Council held two days of hearings on the Ordinance, replete with testimony of residents and community leaders registering support for its adoption. As numerous residents explained, when "[a] gang claims the neighborhood as its own," "[t]hey know where you live," "what time you leave, what time

[12] For example, the transcripts of the meeting of Chicago City Council Committee on Police and Fire on May 15, 1992, and May 18, 1992, demonstrate that there was widespread support for the Ordinance from neighborhood groups on Chicago's predominantly minority 7th, 8th, and 20th wards on the south side of the city.

you come home." Supp. R. I at 54, 66, 67. "You can't get on the bus * * * [or] go to church on Sundays," because "[w]hen you go to the bus stop, there is a group of people" waiting. *Id.* at 108. Residents of Chicago's poorer neighborhoods — those located in proximity to the expressways — also described the loitering of gang members and associates as designed to facilitate drug sales: individuals loiter on corners to advertise the wares of associates hidden in dark alleys and to warn their compatriots of the arrival of police. *Ibid.* As gang control solidifies, "people begin to hide behind locked doors, [and] the gang is free again to turn the community into open air drugstores and eventually a war zone." *Id.* at 54. Not surprisingly, when the proposed Ordinance was put to a vote, Aldermen representing the city's poorest, predominantly minority wards—*e.g.*, Alderman Ed Smith, representing Chicago's highest-crime police district—supplied the key support for its passage.

These communities continued to support the Ordinance after enactment. In fact, the City Council recently adopted a resolution supporting the invalidated Ordinance by a 3-to-1 margin. *Journal, City Council, Chicago,* May 20, 1998, at 70134, 70135. Significantly, representatives of predominantly African-American and Latino wards — especially those in which gang-related crime poses serious challenges to the daily lives of residents — voted in favor.[13] In addition, the residents of these same wards have been actively organizing a petition drive in support of the Ordinance. To date, over 8,500 signatures have been collected throughout the City. *1998 Chicago Community Policing Convention Resolution Endorsing Chicago's Anti-Gang Loitering Ordinance*, on file with Office of City Clerk. Over *half* of these have been collected in the predominantly Latino communities of Pilsen, Little Village, Back

[13] Alderman representing the predominantly African-American 2d, 7th, 8th, 17th, 20th, 21st, 27th, and 29th wards all voted in favor of the resolution. Similarly, Alderman Frias, Olivo, Solis, Suarez, and Colom, all of whom represent heavily Latino-influenced wards, voted in favor. *Journal, City Council, Chicago, supra.*

of the Yards, Marquette Park, and Gage Park, all wards with vexing crime problems. *Ibid.*

In short, any suggestion that the Ordinance was adopted as a cover for harassing minority youths is completely misguided. Indeed, Aldermen from high-income and exclusive areas *could not* have sought to have it applied in this way, since enforcement is expressly confined to neighborhoods suffering from a pronounced gang presence. Moreover, the City volunteered not to enforce the Ordinance in those wards in which the Alderman did not support it. See F. Spielman, *Anti-Gang Law Won't Be Abused, City Says*, Chi. Sun-Times, June 19, 1992, at 10.

Nor can it be credibly maintained that those citizens who supported the Ordinance did so to oppress minorities within their own neighborhoods. Although not every person in those communities faced a significant risk of being approached by the police under the Ordinance, even those who were never asked to "move along" felt its impact in a meaningful way. After all, those who were subject to the Ordinance were not "outsiders"; they were the sons and daughters, the brothers and sisters, and the friends and neighbors of the community's own residents. Indeed, residents who supported the Ordinance did so precisely because they saw it as an acceptably moderate way to steer their children and their neighbors' children away from the gang life.

The spirit that marked community support for the Ordinance reflects two larger currents of sentiment in inner-city communities. The first is an extended sense of empathy. Individuals in these communities tend to evaluate whether a policy benefits them individually by considering its impact not just on *themselves* but also on members of the groups to which they belong. University of Chicago political scientist Michael Dawson has referred to this decisionmaking process as "linked fate." M. Dawson, *Behind the Mule: Race and Class in African-American Politics* 75-84 (1994). Dawson has demonstrated through extensive use of public opinion

surveys that linked fate is especially prominent among African-Americans.

It was, in fact, this sense of solidarity with — and *not* any antagonism toward — the community's youth that motivated the grass-roots support for the Ordinance. Testifying at the City Council hearings, for example, Acasi Abey, President of the Brothers West Association, objected to law enforcement strategies that treat gang members as outsiders:

> [I]t's a community problem. I think a lot of times we approach a gang problem as if these kids were from outerspace. They are next door neighbors. Some of them go to church. Some of them are in school. Some of them are in college.

Supp. R. I at 143. Mr. Neil Bosanko, head of *amicus* South Chicago Chamber of Commerce (an organization comprising 275 businesses, churches, and school and community groups), is a *parent* of a youth imprisoned for his involvement in a gang-style murder. He supported the Ordinance as a morally responsible way to steer community youth away from gang life and to counter the escalating number of young murder victims from his neighborhood and young lives wasted in prison.

The second common sensibility that motivated the grass-roots support for the Ordinance was resentment of "get tough" law enforcement strategies. These approaches, which feature severe prison sentences for drug-dealing and related "street" crimes, can in fact *undermine* inner-city communities' own capacity to resist crime. Empirical work in criminology (undertaken, significantly, in Chicago) demonstrates that institutions of community life such as friendship networks, shared adult supervision of teens, and informal associations are critical to a neighborhood's ability to control offenders. See R. Sampson, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 Science 918 (1997); R. Sampson et al., *Community Structure and Crime: Testing Social-Disorganization Theory*, 94 Am. J. Soc. 774 (1989). Widespread imprisonment in high crime neighborhoods breaks up

families, disrupts local employment markets, and generally enfeebles the community institutions that prevent crime. See T. Meares, *Social Organization*, *supra*, at 205-11. The "get tough" style of law enforcement is generally resented by minorities for precisely that reason. In sum, the residents of poor, minority communities favor "middle ground" solutions to crime — ones that furnish a reasonable prospect of relief from crime without severely disrupting their communities. See T. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal* Law, 1 Buff. Crim. L. Rev. 137, 144-47 (1997) (documenting that African-Americans are more likely to support drug criminalization, but to oppose severe penalties for offenders, than are similarly situated whites).

Testimony at the hearings shows community residents' awareness of the high costs that both gang criminality and severe prison terms visit on poor, minority communities. Imprisonment of youths such as Mr. Bosanko's son destroys lives just as surely as does gang violence. The goal of the Ordinance, as one resident put it, was not "to hurt anyone," but only to give the police the power "to clean these corners up." Supp. R. I at 67. Given the unusual sensitivity of the residents of these neighborhoods to the individual and societal costs of invasive policing, their considered judgment that the Ordinance embodies a reasonable accommodation of liberty and order is entitled to substantial deference.

III. THE ORDINANCE REASONABLY BALANCES LIBERTY AND ORDER

Because the coercive incidence of the Ordinance is felt by members of the affected communities generally, this Court should afford considerable deference to the judgment of the residents' political representatives that the Ordinance embodies a reasonable balance between liberty and order. See Part I, *supra*. Under this standard, the Ordinance passes muster under both procedural and substantive Due Process. The Ordinance is designed to protect the *whole* community — not just law-abiding citizens, but prospective

and current gang members as well — from the destructive impact of gang criminality. It does so, moreover, not by severely punishing gang members, who are also in significant ways *victims* of social conditions that they did not create. Rather, through a guided regime of discretion, subject to ongoing political monitoring, the Ordinance attacks the pathological social norms that fuel gang criminality and destroy the lives of gang members and non-gang members alike.

A. The Ordinance Substantially Promotes Order

1. *Gang criminality plagues inner-city neighborhoods.* Gang criminality has made the inner-city neighborhoods of Chicago deadly places to live. Stories of innocent bystanders shot in gang-war crossfire have become staples of newspaper headlines and TV news in Chicago as elsewhere. *E.g.*, D. DeFotis, *Police Fret for Public after Gang Shootings*, Chi. Trib., June 2, 1998, at B1; S. Power, *Boy Headed to School Killed by Gang Member, Police Say*, Dallas Morning News, Jan. 29, 1998, at 21A.

Although criminal gangs have long been part of the urban landscape, they have taken a dramatic new direction in recent years, away from small-scale and localized activities to highly organized takeovers of entire neighborhoods based on the acquisition of lethal weaponry financed by lucrative trading in crack cocaine. See H. Covey, et al., *Juvenile Gangs* 101 (1992); S. Mills & D. Bunuel, *Small Gang's Big Grip Troubles Neighborhood — The Saints Have Grown More Violent And More Diverse Since Forming In The 1960s*, Chi. Trib., Feb. 11, 1998, at B1. Brass knuckles and baseball bats are no longer the weapons of choice. See *There Are No Children Here*, Economist, Dec. 17, 1994, at 21 ("Now automatic and semi-automatic assault weapons are *de rigueur*"). Chicago and Los Angeles alone account for 1,000 gang homicides annually. OJJDP Fact Sheet, *supra*.

Street-level intimidation is one of the primary strategies by which gangs extend their influence. By stationing small groups of

gang members on the streets, gangs stake out and lay claim to turf, sell drugs to finance the procurement of arms, recruit new members (often coercively), serve as lookouts and intelligence gatherers, and intimidate neighborhood residents and passers-by. Intimidation takes many forms, including wearing gang colors and clothing, flashing gang signs, and plastering buildings with graffiti. See M. Genelin, *Gang Prosecutions: The Hardest Game in Town*, in *The Gang Intervention Handbook* 417 (1993). Street-corner squads of gang members also facilitate the commission of violent gang crimes. See M. Klein, *The American Street Gang* (1995); *Man Demanding Gang Affiliation Shoots Teen Standing on Street*, Chi. Trib., Feb. 17, 1998, at B3.

Law-abiding citizens are effectively imprisoned in their homes as a result of the mere presence of gang members on the streets. At the City Council hearings prior to passage of the Ordinance, residents vividly described their fear to walk their own streets in the face of loitering gang members for whom drugs, shootings, and vandalism constitute business as usual. See Supp. R. I at 53, 62, 93, 95, 110, 132, 138. Civil rights leader Jesse Jackson expressed the feelings of many when he stated, "Just to think we can't walk down our own streets, how humiliating." M. Johnson, *Crime: New Frontier*, Chi. Sun-Times, Nov. 29, 1993, at 4.

Children are particularly vulnerable to the intimidation of gang members congregating on the streets. Fear is the primary tool of gang recruitment. "[I]f you're [a child and] not in a gang," a Chicago anti-drug counselor told the Economist, "you're a target wherever you go." *There Are No Children Here, supra*. In Chicago, the heavy gang presence on the streets around the Robert Taylor housing project has resulted in "waves of fear-induced absenteeism" from neighborhood schools, prompting hundreds of volunteers to band together to shepherd children to school and the School Board to hire dozens of parents to serve as escorts. S. Braun, *Shepherds for a Flock in the Cross-Fire*, L.A.

Times, Jan 16, 1998, at A1; M. Martinez, *Parents Paid to Walk Line Between Gangs and School*, Chi. Trib., Jan. 21, 1998, at A1.

Gangs have focused their recruitment on increasingly younger children as the competition to control turf and drug markets has intensified. See P. Thomas, *Putting Children on the Front Lines*, Wash. Post, June 20, 1996, at A1; S. Mills & D. Bunuel, *Not Yet 13 — and a Murder Suspect*, Chi. Trib., Feb. 4, 1998, at A1; *There Are No Children Here, supra* (citing Chicago anti-gang counselor's estimate that 80% of boys aged 13 to 15 in the area where he works are involved in gangs). Moreover, whether or not they are gang members, children growing up in gang-dominated neighborhoods often show signs of post-traumatic stress disorder. A. Gonzalez et al., *Introduction to Gang Violence Prevention* 5-6 (1990). A study of children in Chicago day care centers found that 100% of them had seen a shooting by the age of five. P. Bennett, *Growing Up, Skewed, with Violence*, Bost. Globe, June 4, 1992, at 1. As one journalist reported several years ago, "many of the children emerge from the streets of Los Angeles more psychologically scarred than the young mujahedin who patrol the mountain passes of Afghanistan." A. Stanley, *Child Warriors*, Time, June 18, 1990, at 30.

Inner-city residents in Chicago and elsewhere are, in a very real sense, engaged in a battle to protect themselves from a deadly urban disease that victimizes both gang members and non-gang members. Their formidable challenge is to find a cure that does not itself threaten the well-being of their communities and children.

2. *The Ordinance is geared to reducing gang activity through its effect on social norms.* The disease of gang criminality has proven notoriously resistant to treatment. The conventional prescription is the "crack down" strategy of severe prison terms, which has done little to reduce gangs (see, *e.g.*, W. Miller, *Why the United States Has Failed to Solve Its Youth Gang Problem*, in *Gangs in America* 263, 267 (C. R. Huff ed., 1990)),

while leaving a trail of broken lives and fractured communities in its wake (see Meares, *Social Organization*, *supra*, at 206-07).

The Ordinance employs a unique approach to combating gangs based on a distinctive theory of why they exist. Rather than trying to bludgeon gang members into submission through severe punishments, the Ordinance seeks to reform the *social norms* that drive individuals into crime and weaken the community's own crime-defense mechanisms.

The causes of gang criminality are subtle. Residents of gang-ridden neighborhoods are not invariably poorer than the residents of relatively gang-free ones. See Miller, *supra*, at 280-81. Nor is law-enforcement in gang-ridden neighborhoods invariably more lax. See *id.* at 267. Rather, the difference between these communities lies mainly in the attitudes of their residents toward gangs. Juveniles in gang-ridden neighborhoods do not necessarily look up to gang members. Indeed, they are just as likely as those in relatively gang-free neighborhoods to resent gangs as violent and destructive. See Louis Harris & Assocs., Inc., *Between Hope and Fear: Teens Speak Out on Crime and the Community*, table 5-2, at 104 (1995). Nevertheless, those in gang-ridden neighborhoods *are* much more likely to believe that a *majority of their peers* admire gang members: whereas only 19% of juveniles in relatively gang-free communities believe that, 66% of those in gang-ridden ones do. *Ibid.*

These perceptions can reinforce themselves and ultimately determine the level of gang activity in a particular community. In relatively gang-free neighborhoods, the belief that others devalue gang membership strengthens the aversion that individual youths have toward joining them. But the belief of juveniles in gang-ridden neighborhoods that their peers admire gang members can make joining one seem worthwhile even to those only weakly committed (or opposed) to gangs. See D. Matza, *Delinquency and Drift* 54-56 (1964). Notwithstanding their private reservations, moreover, the decision of such individuals to join gangs conveys

publicly that they, too, value membership, a signal that reinforces the pressure on other teens to do the same. See *id.* at 52-59. This "system of shared misunderstanding" is one mechanism by which social norms fuel criminal gang activity. *Id.* at 53.

Another is the effect of visible gang activity on emotional dispositions. In a community pervaded by gang activity, residents are more likely to form the aggressive disposition that gang members themselves prize. The apparent authority and status of gang members imbues their mannerisms with connotations of strength. Indeed, the failure to imitate their demeanor can make one appear weak and vulnerable. See E. Anderson, *Streetwise: Race, Class, and Change in an Urban Community* 177-79, 181 (1990); M. Jankowski, *Islands in the Street: Gangs and American Urban Society* 28 (1991). As a result, individuals face strong pressure to cultivate the aggressive bearing associated with gang membership. When numerous individuals cultivate that bearing simultaneously, more of them are likely to turn to crime, both because of the (mis)information those mannerisms impart about public attitudes toward gang membership, and because of the obstacles they create to interactions with law-abiders, who strongly devalue aggression. See Anderson, *supra*, at 177-78, 189.

This social-norm account not only helps to explain why gangs exist, but also identifies which policies are likely to abate them. The conventional suppression strategy does not, in part because policies that severely punish gang activity may actually reinforce the norms that promote gang membership. Delinquency is status-enhancing because juveniles often view willingness to break the law as a sign of strength and courage. See, *e.g.*, W. Miller, *Lower Class Culture as a Generating Milieu of Gang Delinquency*, 14 J. Soc. Issues 5, 8-9 (1958). The more severe the penalty, the more strength law-breaking projects. Thus, the crackdown strategy is at war with itself.

A more effective approach is to attack the public signs and cues that inform juveniles' (mis)perception that their peers value

gang criminality. That is what Chicago is trying to achieve with the Ordinance. Other jurisdictions seek to produce the same effect through curfews or nuisance injunctions. See Livingston, *supra*, at 640-42. By preventing gangs from openly displaying their authority, these policing strategies counteract the perception that gang members enjoy a high status in the community. As that perception recedes, so does the reputational pressure to join them.

The suppression of open gang activity also positively influences the attitude and behavior of law-abiding members of the community. Like other forms of public disorder, gang activity drives some law-abiding citizens out of the community and others off the streets, thereby depriving the community of their stabilizing influence. See Anderson, *supra*, at 2-5, 58-59, 69-76; J. Jacobs, *The Death and Life of Great American Cities* 29-35 (1961). In addition, gang activity drives a wedge between the community and the police. When individuals understand gangs to be in control, they infer that cooperating with law-enforcement officials is likely to be both futile and dangerous. See G. Akerlof & J. Yellen, *Gang Behavior, Law Enforcement, and Community Values* in *Values and Public Policy* 173-84 (H. Aaron et al., eds., 1994). The reluctance of the community to turn on the gangs not only shields them from punishment but also legitimizes gang membership in the eyes of potential recruits. See Jankowski, *supra*, at 193-202. By counteracting perceptions that gangs control the community, gang-loitering laws and curfews give law-abiders the confidence they need to oppose gangs. Once the community withdraws its support for them, the perception of waning gang influence quickly becomes a reality. See *id.* at 201-02.

A growing body of evidence documents the effectiveness of the social-norm strategy for fighting gangs. Law-enforcement officials in Chicago, for example, report dramatic reductions in violent offenses in the neighborhoods where the Ordinance has been most vigorously enforced. See Meares, *Social Organization*, *supra*, at 225. Numerous other municipalities report the

effectiveness of curfews in reducing the incidence of juvenile victimization and juvenile crime. See Office of Juvenile Justice and Delinquency Prevention, U.S. Dept. of Justice, *Curfew: An Answer to Juvenile Delinquency and Victimization?*, Juvenile Justice Bulletin, April 1996, at 1, 3-9. Courts should respect the considered judgment of Chicago's lawmakers that the Ordinance embodies the most promising way to solve the persistent problem of gang criminality.

B. The Ordinance Places Minimal Restraints on Liberty

The Ordinance is carefully crafted to minimize any restraint on liberty. In fact, both because it serves as a substitute for severe punishments, and because it dissipates widely resented norms, the Ordinance may actually *enhance* liberty for many youths likely to be subject to the "move along" orders it authorizes. Moreover, both the Ordinance and its implementing regulations employ objective standards to limit police discretion and to provide gang loiterers with an opportunity to avoid any criminal sanction simply by obeying an order to move along.

1. The Ordinance is liberty-enhancing for the community at large and for youths who resent pressure to join gangs. In declaring that the Ordinance unconstitutionally abridges liberty, the Illinois Supreme Court focused *only* on the restraints that the Ordinance put on the behavior of gang members. As a result, it failed to consider the various ways in which the Ordinance actually *enhances* the liberty of the communities in which it is enforced. *Cf. Connecticut* v. *Doehr*, 501 U.S. 1, 11 (1991) (due process requires "due regard for any ancillary interest" of third parties).

First, the Ordinance enhances the liberty of community *residents* to use and enjoy their own streets. Gang crime and intimidation diminish the liberty not only of their victims, but also of community residents who must take costly and opportunity-sacrificing precautions to avoid becoming victims. Permitting gang members to camp out on city streets impedes the very liberties

invoked by the court below — to travel, to move freely, and to associate with others. People living in gang-infested neighborhoods who wish to walk along their streets and to associate with their neighbors have every right to do so free of threats, whether spoken or silent, and to expect the police to take measures to promote their safety and the integrity of their homes and businesses.

By seeking to prevent serious crime *before* it occurs, the Ordinance breaks the gangs' stranglehold on the streets, destroys their aura of invincibility, and disrupts their ability to commit more serious crimes. As the California Supreme Court recently observed, to forfeit the liberty of peaceful and industrious residents of a community "to preserve the illusion of freedom for those whose ill conduct is deleterious to the community as a whole is to ignore half the political promise of the Constitution and the whole of its sense." *People ex rel. Gallo* v. *Acuna*, 929 P.2d 596, 618 (Cal.), cert. denied, 117 S. Ct. 2513 (1997).

Second, the Ordinance liberates *community youth* from the intense pressure that *they* feel to join gangs. The vast majority of individuals join gangs *not* because they value gang membership intrinsically, but because they perceive (mistakenly) that their peers value it and (correctly) that failing to join can lead to deadly repercussions. See p. 22, *supra*. These impressions are formed and transmitted through the intimidating presence of gang members on neighborhood streets. See pp. 22-25, *supra*. By vanquishing this presence, the Ordinance relieves the pressure that drives youths into self-destructive gang criminality. Thus, it should come as no surprise that over 1,500 youths in Chicago have registered support for the Ordinance. See *1998 Resolution*, *supra*.

The Ordinance thus reflects a "combined interest in protecting both the community and *the juvenile himself* from the consequences of future criminal conduct." *Schall* v. *Martin*, 467 U.S. 253, 264 (1984) (emphasis added). It recognizes that society has a legitimate interest in protecting a juvenile from "the downward spiral of criminal activity into which peer pressure may lead the child." *Id.*

at 266. In that sense, it is liberty-enhancing, even with regard to many of the very persons likely to be its targets.

2. The ordinance is a liberty-conserving alternative to conventional "crack down" strategies for combating gangs. The Illinois Supreme Court's conclusion that the Ordinance exacts an unconstitutional toll on liberty also overlooks the liberty-destroying effects of severe punishment — the Ordinance's principal alternative. Legislatures commonly attempt to compensate for judicial restrictions on effective street-level policing by adopting even longer prison terms. R. Posner, *The Most Punitive Nation*, Times Literary Supp., Sept. 1, 1995, at 3, 4; W. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1 (1997). Indeed, many inner-city residents support anti-loitering laws precisely because they see them as tolerably *moderate* alternatives to draconian punishment of minor drug offenses. See p. 17, *supra*. The kids whom the police can't order off the streets today, they realize, are the same ones they'll be carting off to jail tomorrow.

The identity of the Ordinance as an alternative to long prison terms goes to the heart of the interest that the Neighborhood Groups have in this case. As coercive as enforcing order on the streets can be, it pales in comparison to the disproportionate impact of incarceration on young African-American and other minority men.[14] The ironic consequence of judicial decisions invalidating the Ordinance and like forms of community policing would be a vast curtailment of individual liberty in the name of preserving it.

3. Objective criteria and political monitoring furnish safeguards against abuse. The Illinois Supreme Court held that the Ordinance was invalid *on its face*. A Due Process facial

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[14] See, *e.g.*, M. Mauer & T. Huling, *The Sentencing Project, Young Black Americans and the Criminal Justice System: Five Years Later 4* (1995) (finding one-third of African-American men are either imprisoned, on parole, or on probation).

challenge should be sustained only if "no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). That is clearly not the case here: the objective enforcement criteria specified by the Ordinance itself and by the police department's enforcement guidelines, combined with the community consultation procedures found in the regulations, reasonably constrain discretion. Considered against the backdrop of the community's own internalization of the effects of the Ordinance, these safeguards clearly satisfy Due Process. See Part I, *supra*; Livingston, *supra*, at 650-70.

Significantly, the Ordinance incorporates an objective standard against which to test the propriety of an officer's order to disperse. Such an order is authorized only if the officer "reasonably believes" that one or more members of a group of loiterers is a member of a criminal street gang. Pet. App. 61a. In addition, the terms "criminal street gang" and "loiter" are carefully defined to deter any over broad reading. *Id.* at 61a-62a. These provisions safeguard against any concerns about unfettered police discretion.

Such concerns should be further allayed by the Chicago Police Department's implementing guidelines, specifically adopted "to ensure that the anti-gang loitering is not enforced in an arbitrary or discriminatory way." Pet. App. 65a. Under those guidelines, the Ordinance may be enforced only by trained officers in certain "areas frequented by members of criminal street gangs" — as designated after consultation with community leaders and residents — thereby significantly limiting the scope of enforcement. Pet. App. 68a. Thus, the Ordinance and regulations permit criminal sanctions only based on "a prediction of future criminal conduct [that] is 'an *experienced* one based on a host of variables' that cannot be readily codified." *Schall*, 467 U.S. at 279 (emphasis added). Finally, the guidelines oblige the police to consult with community groups concerning implementation of the Ordinance

(Pet. App. 68a), thereby assuring effective and ongoing *political* oversight of the exercise of police discretion.[15]

Should this Court uphold the lower court's decision to invalidate the Ordinance, it will remit Chicago — not to mention other cities contemplating norm-focused strategies for combating gangs — to policing strategies that involve *even more* discretion. A reasonably close substitute for Chicago's invalidated gang-loitering law, for example, would be New York's strategy of order-maintenance policing. See generally G. Kelling & C. Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (1996). The "public order" provisions at the base of that strategy — including laws against public drunkenness, prostitution, aggressive panhandling, jaywalking, and unlicensed street vending — are specific enough on their face to survive vagueness challenges. See Livingston, *supra*, at 615-16. Yet the officers who enforce these laws retain considerable latitude about whether to enforce them at all, and, if so, where and against whom. See *id.* at 609. Teen curfews invite considerable discretion as well. Distinguishing legitimate from abusive police behavior is thus much more difficult when a police department engages in general order-maintenance policing than it is under a gang-loitering ordinance like Chicago's, which, contrary to its apparent generality, jealously guards against the diffusion of enforcement authority. Indeed, New York's order-maintenance policing reportedly has generated a considerable increase in police-misconduct complaints. See D. Barry & D. Sontag, *Disrespect as Catalyst for Police Brutality*, N.Y. Times, Nov. 19, 1997, at A1.

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[15] The court below disregarded the Police Department's guidelines on the ground that they were not binding under state law. Pet. App. 16a. This was error. As this Court has made clear, courts can and should look to administrative constructions to determine, as a matter of federal constitutional law, whether a state statute is susceptible of valid applications sufficient to defeat a facial challenge. See, *e.g.*, *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court *or enforcement agency* has proffered") (emphasis added).

CONCLUSION

Chicago's gang loitering ordinance represents a modest attempt to restore order to the city's streets while preserving the liberty of those most likely to bear the brunt of criminal law enforcement. The Ordinance enjoys the broad support of the communities where it is enforced, enhances the liberty of residents who lack other effective means of combating gang intimidation, and is responsibly crafted to constrain police discretion in its enforcement. To strike the Ordinance down on the basis that it is unduly "vague" or somehow interferes with Respondents' "fundamental right to loiter," as did the Illinois Supreme Court, would disserve the very communities the Due Process Clause of the Fourteenth Amendment was designed to serve.

The judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted.

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No. 97-1121

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

CORRECTED COPY

City of Chicago,

Petitioner,

v.

Jesus Morales, et al.,

Respondents.

On Writ Of Certiorari
To The Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF OHIO, ALABAMA, ALASKA, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW YORK, NORTH CAROLINA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, COMMONWEALTHS OF KENTUCKY, PENNSYLVANIA, PUERTO RICO AND VIRGINIA AND TERRITORY OF VIRGIN ISLANDS IN SUPPORT OF THE PETITIONER

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STATEMENT OF *AMICI* INTEREST

The State of Ohio, together with 32 other *amici* States and Territories, join the City of Chicago in urging the Court to reverse the decision of the Supreme Court of Illinois. The *amici* States and Territories share Chicago's concerns about the urban violence and community dysfunction spawned by criminal gangs and share responsibility with their political subdivisions for rooting out these problems. For these reasons and those elaborated below, we offer this brief to urge the Court to uphold the Chicago gang loitering ordinance and to confirm that the Constitution tolerates measured law-enforcement steps in this area.

The problems associated with youth gangs are new in kind -- so new that they would have surprised most prior generations of Americans. Whether it be the random violence associated with such gangs, their aggressive recruitment of new members, their public intimidation of law-abiding citizens or their disproportionate contribution to the palpable sense of lawlessness dominating many American neighborhoods, history offers few examples of this phenomenon. Still less does it trace teenagers as the primary source of such activity.

National statistics regarding gang membership illustrate the point. Not until 1975 did national organizations even begin meaningfully to compile such data. At that point, there were a total of 55,000 gang members. *See* 1995 National Youth Gang Survey (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention August 1997) ("Survey"), at 2. During the next 20 years, the figure increased to 97,940 gang members in 1982, to 120,636 in 1988, to 249,324 in 1992, and to 378,807 in 1994. *Id.* By 1995, the estimated number of gang members nationwide was at least 664,906. *Id.* Other researchers confirm similar trends. Survey, at 2.

Nor has any pocket of the country managed to insulate itself from these disturbing trends. A recent survey confirms the pervasive scope of gang influence in modern America: It reveals gang activity in all fifty states; it demonstrates a gang presence in rural as well as urban counties; and it shows a total of 23,388 youth gangs. Survey, at xi. The increase in gang membership extends to all racial groups, be they Hispanic, Caucasian, African-American or Asian. A. Valdez, *Gangs: A Guide To Understanding Street Gangs* (1997), at 356-57; R. Jackson & W. McBridge, *Understanding Street Gangs* (1984), at 31.

Along with the widespread expansion of gang membership has come an all-too-familiar pattern of increased criminal activity. In 1993, there were an estimated 580,331 gang-related crimes nationwide, a number that reflects an eight to eleven fold increase from 1991. D. Curry, et al., *Estimating the National Scope of Gang Crime from Law Enforcement Data* (Nat'l Institute of Justice, Aug. 1996), at 3-4. Most law enforcement agencies report that gang problems have yet to abate, with some reporting that they are the same and almost half reporting that they continue to get worse. Survey, at xi.. A 1996 Ohio study, for example, identified 1,884 gangs in the State with a total membership of 20,443. 1996 *Ohio Gang Survey* (Ohio Attorney General Office Anti-Gang Unit, 1996). According to the study, gang-related homicides grew from 1 per year in 1980 to 69 per year in 1990 to 86 per year in 1995. *Id.*

One of the defining characteristics of street gangs is their desire to assert control over territory and to protect it from rival gangs. *See* Jackson & McBride, at 19. By "claim[ing] a turf or neighborhood as theirs" and by monopolizing street corners through their overwhelming presence, Valdez, at 25, gangs "can literally take control of neighborhoods and cities," *id.* Group loitering thus facilitates efforts to control territory, aids in recruitment, and most conspicuously causes much of the random violence associated with gang activity. From the gang member's

perspective, the fact that "some neighborhoods are continually terrorized by gang attacks," Jackson & McBride, at 20, is simply a necessary evil associated with each gang member acting "as a soldier protecting his turf in an ongoing war with rival gangs," *id.* at 26. From the perspective of other members of the community, of course, the gangs' efforts to control territory by group loitering is a leading cause of random violence. "In 1991, there were 771 gang-related deaths in Los Angeles alone. About 25% of those killed were innocent bystanders, people who had nothing to do with gangs .... They simply were in the wrong place at the wrong time." Valdez, at 41. Similar statistics exist for other cities. *See* J. Howell, *Youth Gangs* (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention Fact Sheet #72, December 1997).

To their credit, State and local governments have responded to these developments through a number of different strategies. At the State level, many legislatures have targeted gang crimes for additional penalties. Ohio for example recently enacted legislation making it a second degree felony to "actively participate" in a criminal gang and to promote or assist in the commission of specified crimes, while also enhancing the penalties for violent offenders convicted under a specification of gang participation. Sub. H.B. 2 (5/11/98). The Ohio legislation follows the lead of California's "STEP" legislation ("street terrorism enforcement and prevention"), first enacted in 1988 and amended several times since then. *See* Cal. Penal Code §§186.20, 186.21 (legislative findings), 186.22(a) (prohibiting active participation as well as promoting or assisting certain predicate offenses), 186.22(c), (f) (definitions), 186.26 (offense of coercing a minor to participate in a gang), 186.28 (offense of supplying firearms to gang). In like manner most other States either criminalize gang participation or enhance penalities based on the gang-related nature of criminal acts. *See* Appendix A.

Continuity and change mark Chicago's response to the problems associated with street gangs. On the one hand, the city has followed the traditional approach of using membership in a criminal gang as a relevant criterion for law enforcement activity. But, in contrast to these other laws, the Chicago ordinance takes a more proactive stance toward law enforcement. Instead of predictably increasing the sentences imposed for gang-related crimes, instead of building still-larger prisons to house the youths responsible for these actions, Chicago has tried to alter the community climate that allows gang activity to fester. In curbing gang loitering, in other words, the city has targeted the environment that allows criminal activity to occur at all. The idea is this: If law-abiding citizens can reclaim the streets, if youths believe they need not join a gang for their own safety, if in short the community no longer tolerates this and other forms of outward lawlessness, gang intimidation and gang crimes will diminish. *See, e.g.*, James Q. Wilson & George L. Kelling, *Broken Windows*, Atlantic Monthly, Mar. 1982, 33-38; George L. Kelling & Catherine M. Coles, *Fixing Broken Windows* (1996).

The Illinois Supreme Court did not appear to doubt any of this. Yet under its holding society's power to defend itself against these acknowledged evils was sharply curtailed. It would seem to be an essential function of State and local government to determine the proper balance between rights and regulations concerning access to and enjoyment of a community's streets, above all to ensure equal access to this basic component of urban life and to curb the kind of urban environment that allows criminal activity to proliferate. Because the *amici* States respectfully believe that the Constitution does not disable them from taking reasoned steps toward criminal gang control and community policing, we submit this brief for the Court's consideration.

SUMMARY OF ARGUMENT

I. The Chicago ordinance does not violate substantive due process. The law as an initial matter meets the minimal requirement of coupling a "rational" measure to "legitimate state interests." *Washington v. Glucksberg*, 117 S. Ct. 2258, 2271 (1997). The thorough fact findings of the Chicago City Council by themselves adequately unite the sensible means of regulating gang loitering to the ends of public safety and public-order maintenance. Neither *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), nor any other case holds to the contrary. No doubt the *Papachristou* laws were "archaic," *id.* at 161, "no longer fit the facts," *id.* at 162, and were "too generalized," *id.* at 171, properly making them susceptible to attack even on rational-basis grounds. But the up-to-date, carefully-calibrated Chicago ordinance contains no such flaw.

Nor does the ordinance warrant heightened review. By any measure of fundamental rights, loitering comes up short. The text of the Constitution offers no indication that loitering deserves special protection. History also fails to sustain this claim, as most States regulated a wide range of loitering activities in 1868, and still do so today. The case law, *Papachristou* included, also fails to establish a constitutional safe harbor for loiterers, much less for those who are members of a criminal gang that has been found to use loitering as a cover for criminal activity, intimidation of law-abiding citizens, and as a method of recruitment.

II. The ordinance also avoids the twin shoals of impermissibly vague laws. First, it supplies all the "fair warning" that due process requires. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The law does not trap the unwary because no prosecution ever occurs unless the police have first asked the citizen to disperse and the citizen has thereafter refused. Second, while the ordinance is "marked by flexibility and

reasonable breadth, rather than meticulous specificity," *id.* at 110 (quotation omitted), it contains ample guideposts to prohibit "arbitrary and discriminatory enforcement," *id.* at 108. The law for example does not cast a large net, but a small one, because only the citizen who disregards a warning to disperse falls within it. And the law's further limitation to loitering by or among criminal gang members further reduces the risk of wholly subjective and capricious enforcement.

III. While this carefully-drafted ordinance satisfies the substantive and procedural dictates of due process on its face, other constitutional protections prevent Chicago and other governments from improperly implementing this and other laws in the future. The distinction between facial and as-applied challenges ensures that a law, even though once upheld on its face, may still not be improperly implemented in particular settings. A wide range of constitutional mandates precludes discriminatory enforcement of such measures, the manipulation of such laws to curb free speech, or the use of such laws to punish individuals for their status rather than their actions.

ARGUMENT

The safeguards afforded by the due process clause, whether procedural or substantive, whether incorporated or unincorporated, do not require an across-the-board invalidation of Chicago's gang ordinance. In each respect the ordinance steers clear of the Fourteenth Amendment's bar against irrational laws, laws that infringe fundamental rights and laws that are impermissibly vague. The lower court's contrary decision should be reversed.

I. THE ORDINANCE DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS.

The Illinois Supreme Court held (Pet. 15a-17a) that the Chicago gang ordinance violates substantive due process in two respects -- because it is "arbitrar[y]" in nature and because it intrudes upon the fundamental right to "freely walk the streets and associate with friends." In each respect, the lower court was wrong, and indeed every benchmark of constitutionality points the other way.

A. The Chicago Ordinance Satisfies The Minimal Requirements Of Rational-Basis Review.

The Chicago ordinance as an initial matter is "rationally related to legitimate government interests." *Washington v. Glucksberg*, 117 S. Ct. 2258, 2271 (1997). The prohibition against arbitrary lawmaking simply does not bar all or even most anti-loitering laws, and certainly not Chicago's. The fact findings of the Chicago City Council amply connect the sensible means of limiting gang loitering to the laudable end of public safety and public-order maintenance. While the lower court relied on *Papachristou* in reaching a contrary conclusion, that decision does not bear the heavy weight the court gave it.

The deliberate nature of Chicago's efforts to regulate criminal gang loitering contrasts markedly with the anachronistic Jacksonville ordinance (and State-law statutes) invalidated by *Papachristou v. Jacksonville*, 405 U.S. 156 (1972) 26 years ago. The *Papachristou* laws addressed a problem whose time had come and gone. As a brief review of the provisions confirms, *see id.* at 158, "Jacksonville's ordinance and Florida's statute were derived from early English law, and employ[ed] archaic language in their definitions of vagrants," *id.* at 161 (quotation omitted). Even though "the theory of the

Elizabethan poor laws" that perpetuated and harshened these laws "no longer fit the facts," and even though the "conditions which spawned these laws may be gone," the "archaic classifications remain[ed]" in Florida in the early 1970's. *Id.* at 161-62 (quotations omitted).

Unlike the *Papachristou* laws, which after years of innocuous desuetude were suddenly enforced in Florida, the Chicago ordinance takes aim at a distinctly modern problem with a fresh set of legislative facts to support it. The law represents the culmination of thorough study and consideration. And it takes on the acute problems of youth gang crime by carefully regulating criminal gang loitering in the urban setting. Three specific harms form the basis for the law:

* **Intimidation.** By occupying a street corner or some other public place, criminal gang members chill ordinary, legitimate passage by law-abiding citizens, thereby securing an area for conducting criminal activity -- most prominently and most usually, drug-dealing.

* **Facilitation.** The presence of loitering criminal gang members provides a context in which crime flourishes. A drug transaction in a loitering crowd provides cover, allows perpetrators to evade being caught, and creates a group dynamic of lawlessness that exceeds the sum of its individual parts. The conspicuous presence of the gang also makes it difficult for innocent youths to resist the temptation (or outright pressure) to join a gang.

* **Victimization.** A cruel feature of criminal gang activity is the loss of young lives through gang shootings, be they the lives of fellow gang members or those of unfortunate bystanders. Loitering by persons with identifiable gang membership, the Chicago experience has shown, creates a frequent target for rival gangs.

These public policy considerations together with those identified in the extensive hearings before the City Council plainly establish a rational basis for passing this law. Unlike the *Papachristou* ordinances, the Chicago law regulates a current and serious problem, and does so on the basis of up-to-date legislative findings. The provision also uses familiar definitions of crime. A "pattern of criminal gang activity" for instance mirrors the familiar concepts of "enterprise" and "pattern of racketeering activity" found in federal and state RICO legislation, *see Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 57-59 (1989), *United States v. Turkette*, 452 U.S. 576, 578-79 (1981), a feature of the law that helps to distinguish it from *Papachristou* and other cases as well. *See Lanzetta v. New Jersey*, 306 U.S. 451, 453-54 (1939) (finding law vague because it defined "gang" to mean simply "two or more persons" without defining impermissible gang conduct).

In further contrast to the *Papachristou* laws, Chicago's delegation of authority to disperse loiterers based on an officer's objective determination that one of them is likely to be a criminal gang member represents an innovation in community policing. It is typical of other urban initiatives designed to abate youth gang crime by moving from a crime-solving model of law enforcement to a preventive, community-policing model. The new approach turns on the insight that by declining to tolerate mild levels of public disorder, cities can avoid the all-too-familiar spiral into more severe disorder, crime and community dysfunction. *See* D. Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L.Rev. 551, 581-82 (1997) (citing empirical research supporting the "broken windows" thesis -- that unremediated disorder leads to greater disorder). Besides offering a fresh approach to urban crime, this initiative also addresses the concern of many urban communities that

"passivity in the face of outrageous street behavior" constitutes a critical law-enforcement shortcoming. G. Kelling & C. Coles, *Disorder and the Court*, 116 Pub. Interest 57, 70 (1994).

In the final analysis, there is little continuity between the laws invalidated in *Papachristou* and the provision challenged here. The *Papachristou* laws no doubt failed to meet the bare rationality standards of substantive due process. The laws were indeed "archaic," 405 U.S. at 161, "no longer fit[] the facts," *id.* at 162, and were "too generalized," *id.* at 171. Instead of being a virtue, the age of the *Papachristou* laws had become a constitutional vice. From the antiquated language used to describe the offenses to the unusual targets of the provisions (*e.g.*, "habitual loafers," "common night walkers," "common railers and brawlers," "persons . . . habitually spending their time by frequenting houses . . . where alcoholic beverages are sold or served," or "persons able to work but habitually living upon the earnings of their wives"), the law lacked even the most modest relevance to modern Florida. But the same simply is not true here. The Chicago law takes aim at a quintessentially modern problem and does so in careful reliance on a set of "new and different conditions." *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) ("while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation"). *See also Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 669 (1966); *Brown v. Board of Education*, 347 U.S. 483, 492-93 (1954). By any measure of rationality, the Chicago ordinance serves legitimate ends and does so through reasonable means.

B. Neither The Text Of The Constitution, History Nor Case Law Establishes A Fundamental Right To Loiter.

Nor does the ordinance warrant heightened review. Loitering simply is not one of those fundamental rights that are (1) "'deeply rooted in this Nation's history and tradition,'" *Washington v. Glucksberg*, 117 S. Ct. 2258, 2268 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)), or (2) so "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,'" *id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Loitering thus has never been -- and should not be -- added to the short list of elemental rights substantively protected by due process, *e.g.*, the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to bodily integrity, and to abortion. *See id.* In this setting, there is no justification for overcoming the "reluctan[ce] to expand" fundamental rights covered by substantive due process. *Glucksberg*, 117 S.Ct. at 2267 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

In reaching a different conclusion, the Illinois Supreme Court did not rely on the text of the Constitution. Nor could it have done so. In simultaneously empowering the people to retain and in some instances resist the authority of their local governments, the Constitution nowhere carves out a safe haven for loiterers. Neither the liberty guarantees in Article I (*e.g.*, ex post facto, impairment of contracts, bill of attainder), Article IV (*e.g.*, privileges and immunities), the Bill of Rights nor the Fourteenth Amendment establishes any such broad libertarian principle. And perhaps the most important liberty safeguard -- the separation of powers within and without the national government created by the structure of the Constitution -- does not do so either.

Quite to the contrary, the States' retention of broad police powers presupposes "a reasonable opportunity to experiment with solutions to admittedly serious problems," including their "interest in attempting to preserve the quality of urban life." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976). The local police power would mean little if it did not permit prophylactic regulations in the name of a greater good, or put differently if the due process clause were "so broadly construed that the Congress and state legislatures [were] put in a strait jacket when they attempt[ed]" to remedy "conditions which they regard[ed] as offensive to the public welfare." *Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536-37 (1949). The "promotion of safety of persons and property is unquestionably at the core of the State's police power," *Kelley v. Johnson*, 425 U.S. 238, 247 (1976), and"[t]here is no doubt that preventing danger to the community is a legitimate regulatory goal," *United States v. Salerno*, 481 U.S. 739, 747 (1987). In the end, any fair reading of the text and structure of the Constitution confirms that the States that imposed the liberty protections of the Constitution upon themselves did not relinquish the basic rights to preserve the safety of their communities and to experiment with new ways for doing so.

Nor do the lessons of history lend support to the claim that loitering is a fundamental right. In neither 1791 nor 1868 is there the slightest indication that the framers of the due process clause, to say nothing of the citizens who ratified the clause, thought that they were outlawing anti-loitering ordinances. Much the opposite is true. State and local governments customarily placed limits on public loitering and vagrancy both before and after ratifying the Fifth and Fourteenth Amendments. *See* Appendix B. And today most States as well as the federal government continue to prohibit loitering in a wide range of settings. *See* Appendix C.

No more helpful to the opponents of this carefully-enacted ordinance are the teachings of precedent. The Court to be sure has been careful to insist that anti-loitering laws comply with the prohibition against impermissibly vague criminal laws. But no holding of the Court has ever found a constitutional right to loiter or what comes to the same thing -- the view that loitering laws are by their nature inherently arbitrary exercises of government power.

Like many other lower courts during the past 26 years, the Illinois Supreme Court relied on the following passage from *Papachristou* in reaching a different conclusion:

> The difficulty is that these [types of loitering] are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.

Id. at 164. Neither this passage nor any other, however, elevates loitering to a fundamental right. The excerpt simply makes the observation -- wholly unnecessary to the result in the case -- that anti-loitering laws frequently implicate innocent-seeming conduct, not that such conduct is forever "outside the arena of public debate and legislative action." *Glucksberg*, 117 S. Ct. at 2268.

II. THE CHICAGO ORDINANCE IS NOT IMPERMISSIBLY VAGUE.

Besides complying with the requirements of substantive due process, the Chicago ordinance also satisfies the due process prohibition against vague criminal laws. The provision avoids the two flaws that characterize such laws -- either that they fail to "provid[e] fair warning" of what is prohibited or that they fail to "provide explicit standards" to limit the discretion of those who enforce the law. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). In plain terms, the ordinance (1) authorizes the police to issue a dispersal order when they reasonably believe that one or more loiterers is a criminal gang member; (2) gives additional notice to all persons covered by the law when they are told to disperse; and (3) sanctions only those who disobey the police orders. These provisions bring the ordinance well within the requirements of due process.

A. The Chicago Ordinance Gives Ample Notice Of The Conduct It Prohibits.

The ordinance plainly satisfies the threshold requirement of "providing fair warning." *Grayned*, 408 U.S. at 108. It "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and what is not in at least one dispositive sense. *Id.* Most notably, Chicago chose not to regulate loitering in and of itself. It opted only to regulate loitering when combined with criminal gang activity and when combined with a refusal to obey a police dispersal order. Under these circumstances, no one can tenably claim surprise. Even the citizen who remains ignorant of the law's existence (which is never a defense), even the citizen who is not a gang member, even the citizen who does not know with whom he or she is loitering, and even the citizen who claims ignorance on all three fronts can never claim lack of notice. Because a violation of the ordinance occurs only after the citizen willfully disobeys

a dispersal order by the police, even the most "fertile legal 'imagination'" cannot contrive situations in which the law will trap the unwary. *Id.* at 108, 110 n.15 (quoting *American Communications Assn. v. Douds*, 339 U.S. 382, 412 (1950)). All told, these features of the law bring it well within the parameters of other laws the Court has upheld, and eliminate any specter of unforeseen prosecutions. *See, e.g., Grayned*, 408 U.S. at 113 (upholding conviction for creating noise near school where law construed to require showing of interference with school activities); *Colten v. Kentucky*, 407 U.S. 104, 108-09 (1972) (upholding conviction under disorderly conduct statute that required compliance with dispersal order). *Cf. Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965) (upholding disobedience-to-police-order law when coupled with element of sidewalk blockage).

Notwithstanding these clear contours of the law and notwithstanding the Court's decisions supporting the provision, the lower court still found a notice problem. It faulted the ordinance for failing to alert the citizen "whether an approaching police officer has a reasonable belief that the group contains a member of a criminal gang." Pet. 11a-12a. In the lower court's view, in other words, the validity of requiring compliance with police orders turns on whether the individuals subject to the order themselves perceive an objective basis for the order, not whether the officers have an objectively reasonable basis for issuing the order. This view does not square with traditional requirements of notice, overlooks contrary vagueness decisions by the Court and threatens to upset longstanding assumptions about the authority of the police to enforce the law.

The lower court, to begin with, misapprehended the constitutional point of notice. It serves not to arm citizens with sufficient information to attack the legitimacy of an application of a statute or even to attack the constitutionality of a law itself, but only to warn citizens of what the law proscribes. Due

process has never required citizens to be sure that all elements of a criminal prosecution have been met before an arrest, only that they have notice of what those elements are, so they can shape their conduct to avoid arrest.

The lower court's analysis also fails to respect precedent. Several of the Court's vagueness decisions have embraced public-order laws that turn on an officer's reasonable belief that a public-safety risk exists, and indeed rely on that belief in upholding the law. *See Boos v. Barry*, 485 U.S. 312, 331-32 (1988) (plurality) (rejecting vagueness challenge to ordinance limiting demonstrations at embassies because it was interpreted to permit dispersal "only when the *police reasonably believe* that a threat to the security or peace of the embassy is present") (emphasis added); *Grayned*, 408 U.S. at 114 (ordinance prohibiting noisy interference with school activity "requires the exercise of some degree of *police judgment*, but, as confined, that degree of judgment here is permissible") (emphasis added); *Colten*, 407 U.S. at 109 (upholding conviction for refusal to obey dispersal order where "*police* had cause for apprehension . . . [of] the risk of accident") (emphasis added). No vagueness case to our knowledge has ever restricted the enforcement of a public-order statute on the ground that it provides insufficient notice of the *officer's reasonable belief* that the terms of the law apply.

Worse still, the lower court's position threatens to upset traditional expectations about the authority of the police to investigate, ferret out and stop crime. The most pertinent benchmark for measuring the authority of law enforcement to stop, seize or question individuals -- the Fourth Amendment -- has long used "reasonable suspicion" and "probable cause" as objective touchstones for determining when government may interfere with individual liberty. *See Terry v. Ohio*, 392 U.S. 1, 20-22 (1968). And the Court has never assessed compliance with this standard from the perspective of the *individual's*, as

opposed to the officer's, objective determination of whether cause exists to request an accounting of an individual's conduct.

As in the Court's vagueness decisions, its Fourth Amendment decisions have frequently examined the objective reasonableness of law-enforcement action from the standpoint of the officer involved, not the individual suspected of crime. *See Ornelas v. United States*, 116 S.Ct. 1657, 1661-62 (1996) ("components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether those historical facts, *viewed from the standpoint of an objectively reasonable police officer*, amount to reasonable suspicion or to probable cause") (emphasis added); *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968) (standard of reasonableness is "would the *facts available to the officer* at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate") (emphasis added) (internal quotation omitted). Just as Chicago authorizes an officer to stop "a person whom he [or she] reasonably believes to be a criminal street gang member," 8-4-015(a), moreover, so too federal drug enforcement agents frequently stop travelers in an airport who fit the profile of a drug courier. In the drug interdiction context, the Court has frequently permitted such detentions, which (it is worth adding) pose far more risk of arrest and loss of liberty than an order to disperse. *See United States v. Sokolow*, 490 U.S. 1 (1989); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985).

Surely, in the light of these precedents, Chicago does not offend the Constitution when it authorizes officers to impose a *de minimis* restriction on individual liberty with a far greater explanation for doing so than these Fourth Amendment decisions require. Here, officers observed a group of persons loitering in a public place. They formed a "reasonable belief" that the individuals belonged to a criminal gang. They asked

them to disperse. Then and only then did the officers arrest anybody, and even then only for failing to do what all citizens in a civil society customarily have been expected to do -- obey the police. *See Cox v. New Hampshire*, 312 U.S. 569, 574 (1941); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) (maintaining public order protects liberty itself from being "lost in the excesses of anarchy"). The authority of law enforcement to intrude upon an individual's liberty simply does not turn on -- and has never turned on -- the suspect's insight into the reasonableness of the officer's action.

Neither do *Papachristou* or *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), change things. The *Papachristou* law did not even involve a dispersal order. It thus did not provide the most explicit form of notice, a requirement that the police first order a dispersal before being empowered to arrest anyone.

Also inapt is *Shuttlesworth*. True, *Shuttlesworth* contains *dicta* criticizing a law construed to permit police to ask any individual "stand[ing]" on a public sidewalk to leave, then giving the police permission to arrest objectors. 382 U.S. at 88. True also, the *Shuttlesworth* law gave notice to citizens accused of standing because the police had to ask them to leave before an arrest could ensue. *Id.* But this bizarre law, written as broadly and irrationally as a law could be, represents a far cry from a law targeting loitering by criminal gang members found to pose a threat to the health and safety of an urban community. Even putting to one side the free speech and racial discrimination concerns lurking beneath the application of the law, *see id.* at 91, *id.* at 102 (Fortas, J., concurring, joined by Warren, C.J.), the *Shuttlesworth* provision contained a notice flaw that the Chicago ordinance does not. While the officer's request to move on alerted citizens that they could not remain standing where they were, it offered no notice of where in the future they could stand, when or with whom. The citizen of

Birmingham truly could "stand on a public sidewalk . . . only at the whim" of a police officer. *Id.* at 90. But that is not true in Chicago. Only those citizens who loiter on a public street, as opposed to simply standing there, may be asked to move on, and even then only when they are loitering with members of a narrowly defined criminal gang. The focused notice provided in the one encounter has little parallel to the absence of notice provided in the other. The Chicago ordinance in the end wholly satisfies the due process requirement of notice.

B. The Chicago Ordinance Supplies Reasonable Standards For Enforcement That Are Legitimately Related To Public Safety.

Just as the ordinance provides ample warning of what it forbids, so also it contains sufficient implementation guidelines. It thus avoids the pitfalls of "arbitrary and discriminatory enforcement," *Kolender v. Lawson*, 461 U.S. 352, 357 (1983), and the risks of a law that has an "unascertainable" standard for enforcement, *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971), *see Kolender*. "As always," it is true, enforcement of the Chicago ordinance "requires the exercise of some degree of police judgment." *Grayned*, 408 U.S. at 114. But that discretion, necessary under any reasoned view of the appropriate powers of law enforcement, does not cross the line between the permitted "flexibility and reasonable breadth" all statutes need, *id.* at 110 (quotation omitted), and the forbidden territory of a standardless law. The law ultimately "defines boundaries sufficiently distinct for citizens, policemen, juries, and appellate judges." *Id.* (internal quotation omitted).

The law cabins police discretion in several important ways. It applies to public loitering, not to standing. *Cf. Shuttlesworth* 382 U.S. at 90. It applies only to those individuals who loiter with members of criminal gangs, not just to "three or more persons" who "assemble" together in a way

that is "annoying" to others. *Cf. Coates*, 402 U.S. at 611 n.1. It requires the police to have a "reasonable belief" that a gang member is present, not just a subjective instinct or personal annoyance. *Cf. Coates*, 402 U.S. at 614; *Kolender, supra.* It prohibits prosecution when the police are wrong (*e.g.*, when no criminal gang member is present), a requirement missing from every one of the vagueness decisions relied on by the lower court. And it permits arrests only when citizens refuse to disperse, thereby sharply curtailing the risks of discriminatory enforcement that existed in *Papachristou, Kolender,* and *Coates*.

The prerequisite of a dispersal order also eliminates another risk associated with general loitering laws. Because police may stop individuals reasonably suspected of criminal activity under *Terry*, a general loitering prohibition without more would allow the police to stop and pat down virtually anyone standing on a public street. Here, however, no violation of the law ever occurs until the dispersal order is ignored, eliminating any such risk of virtually unrestricted *Terry* stops.

On several occasions the Court has upheld other public-order laws that give the police similar discretion and in some cases even more. For example, *Boos v. Barry,* 485 U.S. 312 (1988), rejected a challenge to a law that permitted police to disperse groups near foreign embassies "when the police reasonably believe that a threat to the security or peace of the embassy is present." 485 U.S. at 330. The Court noted that the law's "reach is limited to groups posing a security threat," 485 U.S. at 331, and the law also announced the "prohibited quantum of disturbance" in "words of common understanding." Here, no less, the Chicago ordinance says that citizens may be asked to disperse when police officers have a reasonable belief

that they are loitering with members of a "criminal street gang," and does so because the City Council believes that such congregations pose "a security threat."

Colten v. Kentucky, 407 U.S. 104 (1972), follows a similar course. It upheld a conviction for disorderly conduct when officers ordered a motorist to drive on and he refused to do so. "The State has a legitimate interest in enforcing its traffic laws," the Court observed, "and its officers were entitled to enforce them free from possible interference or interruption from bystanders, even those claiming a third-party interest in the transaction." *Id.* at 109. Based upon their "cause for apprehension that a roadside strip, crowded with persons and automobiles, might expose the entourage, passing motorists, and police to the risk of accident," the police therefore could issue a binding "order to disperse," and arrest offenders when that order was not followed. A similar appreciation of the discretion police officers need explains Fourth Amendment decisions permitting officers to exercise their discretion in determining whether to ask a motorist stopped for a traffic violation to leave the car, *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), or to ask the passenger to leave the car as well, *Maryland v. Wilson*, 117 S.Ct. 882 (1997). Consistent with these views most states permit police officers to arrest citizens who refuse to obey a dispersal order or an order to stay clear of a traffic hazard. *See* Appendix D. Because the law presumes that police officers like all public employees will obey the Constitution, *see Agostini v. Felton*, 117 S.Ct. 1997, 2015-16 (1997), the law properly assumes that they will lawfully exercise discretion in these settings.

In addition to avoiding the ban on standardless laws and the risk of discriminatory enforcement that comes with them, the carefully-gauged discretion of the Chicago ordinance also fits well within the Court's general guidelines concerning the broad police powers reserved to the States and their subdivisions. In

organizing local communities and establishing local rules of conduct, the "police power is . . . ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974). The ordinance at issue of course tries to do just that. It strives to "make the streets safe" from criminal gang recruitment and street crime. *See* Pet. App. 68a (regulation requiring Chicago district commanders to "designate areas in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community" for enforcement of the ordinance).

The Court, moreover, has frequently acknowledged the power of States and subdivisions to enact similar types of prophylactic legislation. *E.g., Williamson v. Lee Optical of Okla, Inc.*, 348 U.S. 483, 486-88 (1955) (upholding law prohibiting all lens-fitting except under direct prescription) ("[T]he legislature might have concluded that [a prescription] was needed often enough to require one in every case. ... It is enough that there is an evil at hand for correction, and that it might be thought that a particular legislative measure was a rational way to correct it."); *Village of Belle Terre*, 416 U.S. at 4 (noting that "historic police power problems need not loom large or actually be existent in a given case" for a law to be valid, because "laws may also find their justification in the fact that, in some fields, the bad fades into the good by . . . insensible degrees"); *Memphis v. Greene*, 451 U.S. 100, 126-27 (1981) ("As a matter of constitutional law a city's power to adopt rules that will avoid anticipated traffic safety problems is the same as its power to correct those hazards that have been revealed by actual events").

All things considered, the Chicago ordinance advances the group goals of public order and community policing while respecting the constitutional rights of individuals to be free of

standardless and arbitrary law enforcement. In many respects, the legality of this ordinance poses a far less severe risk to liberty than the customary right of officers to detain individuals reasonably suspected of crime. Chicago, again, does not authorize a detention based upon loitering with a gang member, but only upon refusal to obey the dispersal order. Far from requiring detention, the police officer's order assumes detention will be avoided when the individual complies with the order. At most, the dispersal order intrudes upon a generalized privilege of casual association in public places -- a privilege that receives no special protection under the Constitution. *See City of Dallas v. Stanglin*, 490 U.S. 19, 23-25 (1989).

III. OTHER SAFEGUARDS PROVIDE AMPLE SECURITY AGAINST IMPROPER APPLICATIONS OF THIS AND OTHER LOITERING LAWS.

Among the competing principles auditioning to govern this case, the most essential may be the assurance that other constitutional doctrines preclude the Chicago ordinance from being improperly applied in the future or becoming the model for improper lawmaking efforts in other jurisdictions. In our view, numerous safeguards exist to prevent improper applications of the Chicago ordinance or of other provisions like it.

First, this is a facial challenge, which is to say an effort to strike the law in all of its applications. Such across-the-board attacks on legislation are by definition the most difficult to sustain. Because courts have a duty to save, not destroy, legislation, *see Adams Fruit Co. v. Barrett*, 494 U.S. 638, 647 (1990), the Court has long respected the presumption of constitutionality by holding that a facial challenge may succeed only after the claimants have met their burden of showing "no

set of circumstances" in which the law may be constitutionally applied." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see Reno v. Flores*, 507 U.S 292, 301 (1993). A similar rule governs vagueness challenges. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). So long as the statute does not substantially infringe the rights of free speech or assembly, which this does not, *see Colten v. Kentucky*, 407 U.S. at 109 (free speech), *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (assembly), *Stanglin*, 490 U.S. at 25 (free speech and assembly), it must satisfy the rigorous requirements of a facial challenge. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984) ("There are two quite different ways in which a statute or ordinance may be considered invalid 'on its face': either because it is unconstitutional in every application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad'"); *Kolender, supra*; *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

Under these circumstances, a decision upholding the law would by no means give law-enforcement officers or legislators a free hand. They would still remain subject to as-applied challenges in the event the law was improperly applied in a given setting or with respect to one group or another. Nor do case-by-case rulings by any means dilute the underlying constitutional mandate. Take a situation in which a particular interpretation of a public-order statute were invalidated. What State would not get the message? State officials who continued improperly to apply the statute would soon feel the deterrent sting of section 1988 attorney fees. And after that they would be sure to see civil rights actions brought against them in their individual capacity, often with little likelihood of qualified immunity. The distinction between facial and as-applied challenges ultimately reflects the benefit of the doubt that federal courts customarily give government officials, namely that they presumably will obey, not offend, their duty to uphold the

Constitution in implementing a statute. And if a "hypothetical possibility" of unconstitutional application develops in the future, *General Motors v. Tracy*, 117 S. Ct. 811, 830 (1997), State and federal courts stand prepared to strike it.

Second, while there has been no plausible showing that any free speech protections have been infringed on this record, the First Amendment also would restrain improper applications of the law in the future. Gang members of course remain free to speak and assemble regarding all manner of subjects. Neither Chicago nor any other government body thus may manipulate a public-order statute to the improper end of curbing free speech or other First Amendment rights.

Third, equal protection precludes such ordinances from being used as an invidious cover for race discrimination. Many of the Court's vagueness decisions involve applications of laws that "are irresistibly suggestive of racial bias." Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 197 (1985). *Papachristou*, for example, involved a vagrancy prosecution of two white women and two black men riding together down a city street. 405 U.S. at 158. *Coates* arose from an "alleged[ly] discriminatory enforcement" of a loitering statute that "figured prominently in the background of the serious civil disturbances that took place in Cincinnati in June 1967." 402 U.S. at 616 n.6. *Cox v. Louisiana*, 379 U.S. 536 (1965), arose in the context of a demonstration by students picketing stores with segregated lunch counters. 379 U.S. at 538-39, 551. *Kolender* involved the prosecution of an African American disk jockey and rock-music promoter who was arrested 15 times in less than two years during late-night walks through a San Diego suburb. 461 U.S. at 354 Livingston; *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551, 612, n.292 (1997). And *Shuttlesworth*, some members of the Court concluded, simply involved the prosecution of civil

rights leaders "in the tense racial conflict in Birmingham." 382 U.S. at 102 (Fortas, J., concurring, joined by Warren, C.J.). *But see id.* at 90 n.3. To the extent equal-protection concerns explain these vagueness decisions, equal-protection law offers a basis for striking these applications of conventional public-order statutes. *See, e.g., Wright v. Georgia*, 373 U.S. 284, 292 (1963), (overturning a disorderly conduct conviction "obviously based, according to the testimony of the arresting officers themselves, upon their intention to enforce racial segregation in the park"); *United States v. Armstrong*, 116 S. Ct. 1480, 1486 (1996).

Fourth, the Eighth Amendment bars status-based prosecutions that attempt to punish individuals for who they are, not for what they have done. It thus violates the provision to imprison a narcotics addict "even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there." *Robinson v. California*, 370 U.S. 660, 666-67 (1962). *See Powell v. Texas*, 392 U.S. 514, 533 (1968) (plurality opinion) ("criminal penalties may be inflicted only if the accused has committed some act . . . which society has an interest in preventing"); *Edwards v. South Carolina*, 372 U.S. 229, 236 (1963) (valid convictions are those "resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed"). Under these cases, while Chicago may assuredly prosecute actively loitering criminal gang members who refuse to leave when asked to do so, *see Scales v. United States*, 367 U.S. 203, 225-27 (1961), it may not prosecute them simply for being passive members of a gang, *cf. Dawson v. Delaware*, 503 U.S. 159, 166 (1992) (mere membership in Aryan Brotherhood not relevant "because the prosecution did not prove that the Aryan Brotherhood had committed any unlawful or violent acts"). Here, of course, the dispersal order itself rests on the criminal nature of the gang's activities, Pet. App. 61a-62a.

Fifth, federal and State courts may invalidate -- and frequently have invalidated -- public-order prosecutions for lack of evidence, again in an as-applied setting. The Court has frequently found an absence of evidence to support individual applications of such statutes. *See, e.g., Barr v. City of Columbia*, 378 U.S. 146 (1964); *Garner v. Louisiana*, 368 U.S. 157 (1961); *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Johnson v. Florida*, 391 U.S. 596 (1968) (per curiam); *Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960); *Palmer v. City of Euclid*, 402 U.S. 544, 544-45 (1971) (per curiam). When justified, the courts should continue to do so in the future.

* * *

Cast in its most sympathetic light, the lower-court decision reflects a zero-sum view of lawmaking in this area -- a choice between a prophylactic interpretation of the due process clause and a prophylactic exercise of the police power. Under the one, judges may sweep up constitutional and unconstitutional State action; but under the other, the police may regulate nefarious and innocent conduct. As between the two, the lower court concluded, it is better to protect the one (individual liberty) over the other (public order).

But this reading of the court's predicament states a false dichotomy. Liberty and security are not mutually exclusive. As this area of the law well illustrates, liberty's gain sometimes becomes liberty's loss. No one knows this better than the law-abiding citizens of urban Chicago whose public square has been overwhelmed by criminal gang members. In overprotecting the rights of Chicago's criminal gangs to walk the streets or congregate on them, the lower court underprotected other members of the community who share the same interest in enjoying these "amenities of life as we have known them." *Papachristou*, 405 U.S. at 164. However constitutional these amenities may be, they surely are rights to be enjoyed by all.

When a city like Chicago thus determines that brazen, intimidating, even coercive, members of its community are infringing the enjoyment of these amenities by all citizens, it ought to have the police power to ensure that the allocation of these amenities is fairly distributed.

In the final analysis, the distinction between facial and as-applied challenges, together with the presumption that the police will obey the constitution or face a host of alternative sanctions if they do not, corrects the misperception that this area of the law is haunted by all-or-nothing-at-all extremes. To respect a community's collective security concerns simply does not slight the liberty of individuals. "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). Chicago has adopted a measured and eminently reasonable mechanism for improving the individual rights of all while improving the collective security of the community when doing so. The innovation should be upheld.

CONCLUSION

For the foregoing reasons, the *amici* States respectfully urge the Court to reverse the lower-court decision.

Respectfully submitted,

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APPENDIX

A. States That Penalize Gang-Related Criminal Activity.

Alaska Stat. §11.41.110(4) (Michie 1996) (gang-participation as an element of crime, e.g., murder); §12.55.155(29) (identifying gang participation as an aggravating factor in sentencing); §11.61.160, 165 (outlawing gang recruitment); Ariz. Rev. Stat. Ann. §§ 13-105(77) (definitions), 13-2308(G) (class 2 felony offense of criminal gang participation) (West Supp. 1997); Ark. Code Ann. §§ 5-74-102 (legislative findings), 5-74-103 (definitions), 5-74-104 (defining first and second degree gang participation offenses), 5-74-203 (gang recruitment offenses), 5-74-105 (offense of using another's property for gang activity), 5-74-107 (unlawful discharging of firearms from vehicle) 5-74-108 (enhancement of penalties acting in concert), 5-74-201 (findings), 5-74-202 (definitions), 5-74-203 (offense of soliciting gang membership) (Michie 1997); Fla. Stat. ch. 874.02 (legislative findings), 874.03 (definitions), 874.04 (enhancement of felonies committed as part of pattern of gang activity) (1993); Ga. Code Ann. §§ 16-15-2 (legislative findings), 16-15-3 (definitions), 16-15-4 (enhancement of gang-related misconduct) (Michie 1996); Ind. Code §§ 35-45-9-1, 2 (definitions), 35-45-9-3 (gang participation offense), 35-45-9-4 (compelling membership in gang) (1993); 720 Ill. Comp. Stat. Ann. 570/405.2 (offense of street criminal drug conspiracy) (West Supp. 1997); Iowa Code Ann. §§ 723A.1 (definitions), 723A.2 (gang participation offense) (West 1993 & Supp. 1997); Kan. Stat. Ann. § 21-4704(k) (sentencing guidelines presume imprisonment for gang offense) (Supp. 1996); La. Rev. Stat. Ann. §§ 15:1402 (legislative findings), 15:1403 (gang participation offense), 15:1404 (definitions) (West 1992 & Supp. 1998); Mass. Gen. Laws Ann. ch. 265, § 44 (offense of coercing minor to join gang) (West Supp. 1997); Minn. Stat. § 609.229 subd. (1)

(definitions), subd. (2) (participation offense) (1992 & Supp. 1993); Mo. Ann. Stat. §§ 578.421 (definitions), 578.423 (participation offense), 578.425 (enhancements), 578.435 (offense of possessing weapons for gang crime) (West 1995); Mont. Code Ann. §§ 45-8-402, 405 (definitions), 45-8-403 (offense of coercing membership), 45-8-404 (enhancement of sentence for gang-related felony), 45-8-406 (offense of supplying firearms to gang) (1997); Nev. Rev. Stat. § 193.168 (doubling prison term for gang-related crime) (1997); Okla. Stat. Ann. §§ 21-856(D) (offense of willfully recruiting minor into gang) (West Supp. 1998); S.D. Codified Laws §§ 22-10-14 (definitions), 22-10-15 (enhancements) (Michie Supp. 1997); Tex. Penal Code Ann. §§71-01(d) (definition), 71-02 (participation offense) (West Supp. 1998).

B. Early Loitering And Vagrancy Laws.

Ark. Rev. Stat. Ch. 154, §1 (1837); Act of March 5, 1861, Del. Rev. Stat. 1852 [As Amended] (1874), at 787, and Del. Rev. Stat. 1852 [As Amended] (1893), at 962; Mass. Gen. Stat. Ch. 165, §28 (1986); 1 Md. Code/Public Gen. Laws art. 30, §173 (Scott & M'Cullough ed. 1860); 2 Md. Code/Local Laws art. §§4, 908, 909, 910 (Scott & M'Cullough ed. 1860); Acts of Feb. 15, 1791, 5 N.H. Laws: First Constitutional Period (Metcalf ed. 1916), at 691-92; Act of June 10, 1799, N.J. Laws Digest (Elmer ed. 1868), at 1007; Act of January 10, 1857, §I, Third, pamphlet at 19; N.M. Rev. Stat. & Laws (1865); 1 N.J. Stat/Rev. Stat. Ch. 20, tit. 2, §1 (1869); Act of June 13, 1836 (P.L. 548), Pa. Stat. Law Digest (Purdon 1910), at 5017-19; R.I. Gen. Stat. Ch. 232, §24 (1872), at 555, Tenn. Code ch. 105, §§1-3 (1875); Tex. Penal Code tit., iv, art. 891-900 (1875); Va. Stat. Ch. 23, §§I-IV (1776).

C. Modern Loitering Laws

State: Ala. Code §13A-11-9 (Michie 1994) (offense of loitering for various purposes, including the purposes of begging, gambling, soliciting sex, or drug use); Ariz. Rev. Stat. §13-2905 (West 1989 & Supp.1997) (misdemeanor offense of loitering in a manner that disturbs public peace or for purposes such as begging, soliciting sex, gambling); Ark. Code Ann. §5-71-213 (Michie 1997) (misdemeanor offense of loitering under circumstances warranting alarm or concern for safety or loitering in specified places); Cal. Penal Code §647(d) and (e) (offense of disorderly conduct for loitering near public toilet with lascivious purpose, or for loitering and wandering without identifying legitimate purpose); Del. Code Ann. tit. 11, §1321 (Michie 1995) (offense of loitering where obstructing public passage, or loitering in specified places, or loitering for purpose of begging or soliciting sex, or loitering under circumstances warranting alarm for safety); Ga. Code Ann. §16-11-36 (1996) (misdemeanor offense of loitering under circumstances justifying alarm or concern for safety); 9 Guam Code Ann. §61.30 (1996) (offense of loitering or prowling in a manner warranting alarm for safety); Ky. Rev. Stat. Ann. §525.090 (Michie 1990)(offense of loitering for drug use or in specified places); La. Rev. Stat. Ann. tit. 14, §107(7) (vagrancy offense for persons "who loiter around any public place of assembly"); Mich. Comp. Laws Ann. §750.167(j) and (k) (West 1991 & Supp. 1998) ("disorderly person" offense where one loiters "about a place where an illegal occupation or business is being conducted," or for loitering in specified places); Minn. Stat. Ann. §609.725(2) (West 1987 & Supp. 1998) (vagrancy offense of loitering); Nev. Rev. Stat. Ann. §207.270 (Michie 1997) (misdemeanor offense of loitering in public place near children); N.H. Rev. Stat. Ann. §644:6 (1996 & Supp. 1997) (offense of loitering under circumstances warranting alarm for safety); N.J. Stat. Snn. §2C. 33-2.1 (West 1996 & Supp. 1997) (offense of loitering for drug-related purposes); N.M. Stat. Ann. §30-20-10 (Michie 1997)

(offense of saloon owner permitting minors to loiter); N.Y. Penal Law §240.35 (McKinney 1989 & Supp. 1998) (offense of loitering for specified purposes such as begging, drug use, sexual solicitation, or in specified places such as school grounds); N.C. Gen. Stat. §14-275.1 (1997) (offense of loitering at public transportation facilities after request by officer to leave); N.D. Cent. Code §12.1-31-01(f) (1997) (offense of sex solicitation while loitering); Ohio Rev. Code Ann. §§2907.241, 3599.24(A)(5) (Anderson 1996) (misdemeanor offense of loitering to engage in [sexual] solicitation, and misdemeanor offense of loitering at polling place during election); Okl. Stat. Ann. tit. 21, §§1171, 1202 (West 1983 & Supp. 1998) (loitering as element of "peeping Tom" offenses); 18 Pa. Cons. Stat. Ann. § 5506 (1983 & Supp. 1997) (misdemeanor offense of loitering or prowling about others' houses); R.I. Gen. Laws §11-34-8 (1994 & Supp. 1997) (offense of loitering for purposes of sexual solicitation); S.C. Code Ann. §16-17-420(b) (Law. Co-op. 1985 & Supp. 1997) (offense of school loitering); Utah Code Ann. §76-10-1302(c) (1995 & Supp. 1997) (loitering as element of prostitution offense); V.I. Code Ann. tit. 14, §§1191, 2221(a)(15, (16), (17) (1997) (offense of loitering under specified circumstances, and vagrancy offense of loitering in specified places); Wis. Stat. Ann. §947.02(3) (West 1996 & Supp. 1997) (offense of loitering for prostitution purposes).

Federal: 4 C.F.R. 25.6 (prohibiting "[l]oitering . . . in the GAO Building or on its grounds which creates . . . a nuisance"); 7 C.F.R. 500.5 (prohibiting "unwarranted loitering" on National Arboretum Property).

D. State Dispersal Laws.

Ala. Code §13A-11-6 (Michie 1994) (misdemeanor offense of "failure to disperse" where a person "participates with five or more other persons in a course of disorderly conduct likely to cause substantial harm or serious inconvenience,

annoyance or alarm, and intentionally refuses or fails to disperse when ordered to do so by a peace officer or other public servant lawfully engaged in execution or enforcing the law"); Ariz. Rev. Stat. Ann. §13-2902(A)(2) (West 1989 & Supp. 1997) (misdemeanor offense of unlawful assembly where a person "being present at an assembly of two or more other persons who are engaged in or who have the readily apparent intent to engage in conduct constituting a riot [defined elsewhere] knowingly remain[s] there and refus[es] to obey an official order to disperse"); Ark. Code Ann. §5-71-207 (a)(6) (Michie 1997) (misdemeanor offense of disorderly conduct where a person "with the purpose to cause public inconvenience, annoynance, or alarm or recklessly creating a risk thereof ... [c]ongregates with two (2) or more other persons in a public place and refuses to comply with a lawful order to disperse of a law enforcement officer or other person engaged in enforcing or executing the law"); Cal. Penal Code §727 (West 1985) (offense of failing to disperse under riot conditions); Colo. Rev. Stat. Ann. §18-9-107(b) (West 1997) (misdemeanor offense of "obstructing highway or passageway" where individual "without legal privilege intentionally, knowingly or recklessly [d]isobeys a reasonable request or order to move issued by a person he knows to be a peace officer, a fireman, or a person with authority to control the use of the premises, to prevent obstruction of a highway or passageway or to maintain public safety by dispersing those gathered in a danagerous proximity to a fire, riot, or other hazard"); Del. Code Ann. tit. 11, §1321 (Michie 1995) (offense of loitering where "[t]he person fails or refuses to move on when lawfully ordered to do so by any police officer"); Ga. Code Ann. §26-2604 (1996) (misdemeanor offense of unlawful assembly where a person "knowingly participates" in an "assembly of two or more persons for the purpose of commiting an unlawful act and the failure to withdraw from the assembly on being lawfully commanded to do so by a peace officer"); 9 Guam Code Ann. §61.10(b) (1996) (misdemeanor offense of 4 or more persons participating in

course of disorderly conduct and failing to disperse upon order to do so); Haw. Rev. Stat. Ann. §711-1102 (Michie 1994) (misdemeanor offense of "failure to disperse" where a person who is participating with "six or more persons .. in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance, or alarm" knowingly fails to comply with a dispersal order by a peace officer); Idaho Code §18-6410 (1997) (misdemeanor offense of "refusal to disperse" where "two or more persons assemble for the purpose of disturbing the public peace, or committing any unlawful act, and do not disperse on being desired or commanded so to do by a public officer"); 720 Ill. Comp. Stat. Ann. §5/25-1(e) (West 1993) (misdemeanor offense of "mob action" where "any participant" in an assembly of 2 or more persons uses force or violence to disturb the public peace, or to do an unlawful act, "does not withdraw on being commanded to do so by a peace officer"); Ky. Rev. Stat. Ann. §§525.060, 525.160 (Michie 1990 & Supp. 1998) (misdemeanor offense of refusing to obey dispersal order in proximity to emergency, and misdemeanor offense where participant in course of disorderly conduct refuses to disperse when ordered to do so); Me. Rev. Stat. Ann. 17A §502, (West 1983 & Supp. 1997) (offense of failure to disperse where persons in participating in, or located in vicinity of, disorderly conduct refuse to disperse); Mass. Gen. L. ch. 269, §2 (1993 & Supp. 1998) (offense of failing to depart from riot when ordered to do so); Mich. Comp. Laws Ann. §750.523 (West 1991 & Supp. 1998) (offense of failing to depart from riot or unlawful assembly on order); Minn. Stat. Ann. §609.715 (West 1987 & Supp. 1998); Miss. Code Ann. §97-35-7(1) (1994 & Supp. 1997) (misdemeanor offense of disobeying various types of police orders); Mo. Ann. Stat. §574.060 (Vernon 1995 & Supp. 1998) (misdemeanor offense of refusing to disperse from riot); Mont. Code Ann. §45-8-102 (1996) (offense of failure of disorderly persons to disperse on order); Nev. Rev. Stat. Ann. §203.020 (Michie 1997) (misdemeanor offense of persons assembling to disturb public peace or do unlawful act and failing

to disperse when ordered to do so); N.H. Rev. Stat. Ann. §§644:1, 644:2(II)9e) (1996 & Supp. 1997) (offense of faling to disperse from riot and offense of disorderly conduct for "knowing refus[al] to comply with a lawful order of a peace officer to move from any public place"); N.J. stat. Ann. §2C: 33-1(b) (West 1995 & Supp. 1998) (offense of persons participating in course of disorderly conduct failing to disperse when ordered to do so); N.Y. Penal Law §240.20(6) (McKinney 1989 & Supp. 1998) (offense of disorderly conduct where one who congregates with others in a public place refuses to comply with order to disperse); N.C. Gen. Stat. §14-288.5(a) (1997) (misdemeanor offense of failing to disperse upon order by a law enforcement officer who has a reasonable belief that a riot or disorderly assemblage of 3 or more persons is occurring); N.D. Cent. Code §12.1-25-04 (1997) (misdemeanor offense of failing to disperse when ordered under riotous circumstances); Ohio Rev. Code Ann. §2917.13(A)(2) (Anderson 1996) (misdemeanor offense for "knowing[] [f]ail[ure] to obey the lawful order of any law enforcement officer engaged in his duties at the scene of or in connection with a fire, accident, disaster, riot or emergency of any kind"); Okl. Stat. Ann. tit. 21, §1316 (West 1983 & Supp. 1998) (misdemeanor offense for failure to disperse on order from scene of riot, rout or unlawful assembly); Or. Rev. Stat. §166.025(1)(e) (1990) (misdemeanor offense of disorderly conduct where one "congregates with persons in a public place and refuses to comply with a lawful police order to disperse"); 18 Pa. Cons. Stat. Ann. §5502 (1983 & Supp. 1998) (misdemeanor offense of 3 or more persons participating in course of disorderly conduct causing or expected to cause harm or serious inconvenience refusing to disperse upon officer's order to do so); R.I. Gen. Laws §11-38-2 (1994 & Supp. 1997) (offense of refusing to disperse during declared emergency); S.C. Code Ann. §16-7-10(a) (Law. Co-op. 1985 & Supp. 1997) (offense of refusing to disperse during declared emergency); S.D. Codified Laws Ann. §22-10-11 (1988 & Supp. 1997) (misdemeanor offense of refusing

dispersal order during riot or unlawful assembly); Tenn. Code Ann. §39-17-305(2) (1997) (misdemeanor offense for refusing to obey official order to disperse "issued to maintain public safety in dangerous proximity to a fire, hazard, or other emergency"); Tex. Penal Code Ann. §42.03(a)(2) (West 1994 & Supp. 1998) (misdemeanor offense of failing to move when ordered to do so to prevent obstruction or "to maintain public safety by dispersing those gathered in dangerous proximity to a fire, riot, or other hazard"); Utah Code Ann. §76-9-104 (1995 & Supp. 1997) (misdemeanor offense of failing to disperse on order at scene of riot, disorderly conduct or unlawful assembly); V.I. Code Ann. tit. 5, §4022 (1997) (offense of failing to disperse upon order to do so); Vt. Stat. Ann. tit. 13, §901 (1974 & Supp. 1998) (offense of failing to disperse upon order from riotous or tumultuous assembly); Va. Code Ann. §18.2-407 (Michie 1996 & Supp. 1997) (misdemeanor offense of failing to disperse on order from place of riot or unlawful assembly); Wash. Rev. Code Ann. §9A.84.020 (West 1988 & Supp. 1998) (misdemeanor offense of failing to disperse on order from congregation of 3 or more persons, where actions of the group create a substantial risk of injury to persons or substantial harm to property); W.Va. Code §61-6-1 (1997) (offense of failing to depart from scene of riot or unlawful assemblage); Wis. Stat. Ann. §947.06(3) (West 1996 & Supp. 1997) (misdemeanor offense for failure to disperse on order where congregation of 3 or more persons creates such disturbance "that it is reasonable to believe that the assembly will cause injury to persons or damage to property").

(15)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

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Petitioner,
v.
JESUS MORALES, *et al.*,
Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF THE CENTER FOR THE COMMUNITY INTEREST AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF THE CENTER FOR THE COMMUNITY INTEREST AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

The Center for Community Interest ("CCI"), formerly known as the American Alliance for Rights and Responsibilities, is a national nonprofit organization dedicated to improving civic and community life and the public spaces that support it.[2] The CCI has had extensive experience

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for the amicus states that no counsel for a party authored this brief in whole or in part and no person, other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] CCI's Board of Directors includes the General Counsel of Connecticut Mutual Life Insurance Company, a past president of Stanford University, a former Assistant Attorney General, and a past President of the American Bar Association.

assisting community groups in reclaiming their neighborhoods from the destructive effects of violence.

The CCI has actively promoted and defended a variety of measures designed to improve the quality of urban life. For example, the CCI helped draft the anti-aggressive solicitation measures that are currently in place in Washington, Baltimore, Berkeley, Cincinnati, Santa Cruz, and Long Beach. The CCI has defended similar ordinances in court and has published numerous articles on this subject in the legal literature (including the leading law review article on the history and constitutionality of panhandling controls) and opinion-editorials appearing in *USA Today, The Washington Post, The ABA Journal, The Sacramento Bee,* and *The Dallas Morning News.* The CCI has also defended drug-related evictions and security searches in public housing, regulations on urban camping, and service learning requirements and tailored drug-testing programs in public schools. Throughout these efforts, the CCI has emphasized the importance to communities of safe, welcoming, and civil public spaces, while challenging extreme assertions of rights that block community progress.

The CCI has advocated the increased utilization of civil abatement laws, including anti-loitering ordinances, in its speeches, workshops, and technical assistance. Civil abatement plays an increasingly important role in community policing efforts under deterrence theories of policing. Deterrence theories of policing suggest that enforcement of public order norms may have a positive snowball effect, and help prevent the commission of more serious crimes. Accordingly, statutes aimed at order maintenance offer an effective, reasonable balance between the imposition of harsh criminal penalties, which may adversely impact communities, and inaction, which leads to a downward spiral of violence. For example, the CCI recently helped to successfully defend the use of seizures, particularly of automobiles, in fighting open-air drug markets and prostitution markets. The CCI is also currently helping to defend Megan's Law statutes, which call for the registration and community notification of sex offenders, and "shaming penalties," such as required sign posting.

Narrowly tailored anti-loitering ordinances are also important deterrence tools. Loitering by criminal gang members intimidates law-abiding community members, and facilitates the commission of crime by gang members. Gang violence is an increasingly serious problem. Anti-loitering ordinances combat serious gang crime by enforcing a community's public order norms, thus making gang members less likely to commit more serious crimes.

The CCI views the constitutional challenge to the Chicago anti-loitering ordinance as an attempt to use the courts to prevent a measured and effective public safety initiative. The ordinance is the product of community initiative. It fights crime by the much less harsh means of prevention, rather than waiting to arrest more serious offenders, with much greater attendant disruption to the social order of the community. This anti-loitering ordinance represents an innovative way to deter community-destroying gang violence. It is more than fair, and much more rational and cost-effective, for communities to enlist law enforcement officials to help them prevent serious gang violence before it occurs.

STATEMENT OF THE CASE

This case arises out of Chicago community efforts to counteract escalating gang violence in their neighborhoods. The question presented to the Court is whether a city ordinance making it illegal for members of criminal gangs to loiter and fail to obey an order to disperse is impermissibly vague or offends substantive due process requirements.

The consolidated appeals at issue arise under the City of Chicago's 1992 gang loitering ordinance. The ordinance provides that "when a police officer observes a

person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more persons, he shall order all such persons to disperse and remove themselves from the area." Anyone refusing to obey such an order violates the ordinance. The Chicago Police Department later implemented regulations in General Order 92-4.

In 1995, the Illinois Appellate Court invalidated the ordinance as facially unconstitutional because it 1) infringed constitutionally protected rights of speech and assembly; 2) was unconstitutionally vague; 3) unconstitutionally criminalized a person's status; and 4) jeopardized Fourth Amendment rights by circumventing the probable cause requirement. *City of Chicago v. Youkhana*, 660 N.E.2d 34 (1995). Based on *Youkhana*, the appellate court then affirmed eight appeals taken by the City from decisions invalidating the ordinance in *City of Chicago v. Malcolm Ramsey, et al.*, and reversed six appeals taken by defendants from judgment in *City of Chicago v. Morales* (unreported decisions). The Illinois Supreme Court then consolidated these three judgments on appeal.

In 1997, the Illinois Supreme Court also invalidated the ordinance, affirming the appellate court's judgment. The court held that the statute was 1) impermissibly vague and 2) offended substantive due process requirements. The ordinance was vague because it did not give adequate notice of what constituted prohibited conduct, used inadequate language, and allowed for arbitrary enforcement. It offended substantive due process because the freedom to loiter is a fundamental right, which implicates the right to travel and the right to association. This Court granted a petition for certiorari filed by the City of Chicago.

SUMMARY OF ARGUMENT

Criminal street gangs are more pervasive and commit more violent crime than ever before. Gang violence threatens law-abiding residents of communities by attacking fundamental community norms. Law-abiding citizens are increasingly intimidated. Those who can afford to do so move out to suburbs or into gated communities. Those who cannot afford to leave retreat to their homes. The net effect is abandonment of many areas of our cities.

Some communities have chosen to resist the gang onslaught, however, by turning to new and innovative means of crime prevention through civil abatement statutes. Studies have found a strong correlation between citizens' perception of their community's level of social order, and their actual level of crime. That is, when social disorder exists, citizens become more and more fearful, retreating to their homes, leaving the public ways to criminal street gangs and their violence. On the other hand, restoring social order to a community helps prevent more serious crime.

Criminal law enforcement can help communities fight this encroaching violence by reinforcing extant community law-abiding norms. When community members feel that social order exists, community members also feel empowered to reinforce law-abiding social norms. Anti-loitering ordinances implement this deterrence theory with respect to criminal street gangs. Such ordinances are efficient, effectively raising the price of crime with less social cost to afflicted communities.

ARGUMENT

I. CRIMINAL STREET GANGS POSE AN INCREASINGLY SERIOUS THREAT TO COMMUNITIES AND LAW-ABIDING CITIZENS. INCREASED GANG PRESENCE AND VIOLENCE DESTROY COMMUNITY STABILITY BY PRESSURING LAW-ABIDING RESIDENTS TO RETREAT INTO THEIR HOMES OR INTO FORTRESS GATED COMMUNITIES.

Criminal street gangs increasingly threaten all of our communities—urban, suburban, and rural. The threat is particularly acute, however, in our cities: there, gangs ever more brazenly dominate neighborhoods struggling to maintain some sense of social order. Gang warfare over turf and drugs continually surpasses itself in extremes of violence. Law-abiding residents, fearful of being caught in the crossfire, are driven out. Those who cannot afford to leave retreat into their homes. Those who can afford to leave often do, retreating to the suburbs, or to modern, urban fortresses of gated communities. The net effect is a gradual abandonment of once thriving neighborhoods to hardened and aggressive gun-toting youths. This—the gradual erosion of ordinary urban freedoms—is the clearest and most immediate threat to rights faced by community residents who choose to remain.

Stable communities have social order-preserving mechanisms that reinforce each other and ensure a functioning social fabric. The presence of gangs strikes at community stability by weakening these mechanisms. Among other threats, law-abiding residents of any vulnerable community confront: the increasing scope of gangs, increasingly serious gang violence, the attendant weakening of existing community structures and of private enforcement initiatives, loss of a generation of youth, intimidation and pressure toward outmigration or retreat into fortress-like gated communities, and a self-perpetuating cycle of disorder.

A. Nationwide, Communities Are Increasingly Vulnerable To A Gang Presence Growing In Scope And Number.

Criminal street gangs are expanding across the nation at an unprecented pace, into all our communities—urban, suburban, and rural. More communities of many different types now recognize a significant gang threat and are desperately seeking new strategies to cope with the growing problem.[3] Gangs most seriously threaten troubled urban centers like Chicago and Los Angeles. In such cities, for example, 14% to 30% of urban adolescents will join a criminal street gang at some point.[4]

Increasingly, however, criminal street gangs have also expanded their reach to threaten less obvious target communities, in hitherto peaceful locales like the suburbs and towns of Virginia and Wisconsin.[5] Nationally, in 1995, more than half of all jurisdictions responding to a Justice Department survey reported youth gang problems; disturbingly, half of those affected cities and towns had populations under 25,000.[6] These communities themselves perceive gangs as an increasingly serious threat: 90% of the Justice Department's survey jurisdictions indicated

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[3] Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, *1995 National Youth Gang Survey* 20 (1995) [hereinafter *1995 National Youth Gang Survey*].

[4] James C. Howell, U.S. Dep't of Justice, *Fact Sheet: Youth Gangs* (1997) (based on a longer report for the Department of Justice by the author, *Youth Gang Drug Trafficking and Homicide: Policy and Program Implications* (1997)) [hereinafter *OJJDP Fact Sheet*].

[5] *See 1995 National Youth Gang Survey, supra* note 3, at 20; *see, e.g.*, Virginia State Crime Commission, *The Study of Youth Gangs in Virginia* (1997); National Gang Crime Research Center, *Gangs in Wisconsin: An Assessment of Law Enforceemnt Agencies* (1995); New Mexico Criminal Information & Analysis Bureau, *Street Gang Update* (1994); New Jersey State Commission of Investigation, *Criminal Street Gangs* (1993).

[6] *1995 National Youth Gang Survey, supra* note 3, at 20.

that their gang problem would likely stay the same or become worse.[7]

Criminal street gangs have also grown in sheer numbers: from 1980 to 1995, the number of cities reporting street gang problems grew nearly sevenfold (to about 2,000 jurisdictions); the number of gangs reported grew eleven and a half times (to more than 23,000 gangs); and the number of gang members increased six and a half times (to more than 650,000 members).[8]

More disturbingly, the presence of youth gangs in schools is growing nationwide: in 1995, students age 12-19 were nearly twice as likely to report street gangs in their schools than in 1989 (28.4% versus 15.3%). Central city students were even more likely to respond that there were street gangs at their schools (40.7%) than were suburban students (19.9%) or students in nonmetropolitan areas in 1995. Yet, between 1989 and 1995, reports of gang presence increased in all three areas (e.g., in central cities, from 24.8% to 40.7%), leaving more and more communities increasingly vulnerable.[9] In short, for the many vulnerable neighborhoods already struggling to maintain some semblance of functioning community order, this alarmingly rapid increase in gang presence makes their efforts that much less likely to succeed.

B. Law-Abiding Residents Of Gang-Ridden Neighborhoods Face An Increased Threat Of Serious And Lethal Gang Violence.

The nature of gang violence has dramatically altered from the "small-scale confrontations and rare but impressive large 'rumbles' of the 1950s and 1960s into the more frequent and more heavily armed guerilla forays, gang-

[7] *OJJDP Fact Sheet, supra* note 4.

[8] *Id.*

[9] Bureau of Justice Statistics, U.S. Dep't of Justice, *Students' Reports of School Crime: 1989 and 1995*, at 8-9 (1998).

bangs, and drive-by shootings of the 1980s."[10] Cars make modern gangs more mobile and extend their criminal reach. Guns—increasingly available and increasingly powerful—make modern gangs significantly more lethal, as skyrocketing youth gang homicide statistics overwhelmingly show: nationally, between 1984 and 1993, the rate of homicides committed by juveniles shot up a shocking 169%.[11] Overall in 1980, there were only 633 youth gang homicides; in 1994, however, Chicago and Los Angeles alone recorded more than 1,000 gang-related killings.[12]

A Los Angeles study found that gang-related homicides are often more violent than nongang homicides.[13] A Chicago study found that nongang members injured by gang violence are likely to be very young or elderly and are slightly more likely to be female, and homicides of nongang members most likely resulted from crossfire.[14] Some

[10] Herbert C. Covey et al., *Juvenile Gangs* 34 (2d ed. 1997).

[11] A recent Chicago study documented gangs' use of firearms: between 1987 and 1994, firearms were used in 96% of all street gang homicides, 51% of aggravated batteries and 70% of aggravated assaults. An automatic or semiautomatic weapon was used in 47% of street gang-related homicides. In 1994, an overwhelming 232 of 240 gang-related homicides were committed with firearms. This is in marked contrast to the period from 1964 to 1994, when street gangs relied mostly on handguns, usually of .38 or lower caliber. From 1987 to 1994, however, the use of semiautomatic or automatic weapons in street gang homicides shot up from 11 to 150. Researchers attribute most of the dramatic increase in deaths from 1990 to 1994 to the increased use of these more powerful weapons. Illinois Criminal Justice Authority, *Research Bulletin: Street Gangs and Crime* 16-17 (1996) [hereinafter *Street Gangs and Crime*].

[12] *OJJDP Fact Sheet, supra* note 4.

[13] Covey, *supra* note 10, at 35.

[14] *Street Gangs and Crime, supra* note 11, at 13; *see also* Covey, *supra* note 10, at 46 (noting that Walter Miller's influential gang violence study found that women and children were the most likely nongang victims).

homicides, however, involved victims of mistaken identity: in Denver, a bicycle-riding youth was killed because he wore a baseball cap in the local gang's color.[15] In Chicago, a deaf-mute was killed because gang members thought he was flashing a rival gang sign. In fact, he had been merely using sign language.[16] Others have been deliberately targeted for various gang offenses, including testifying against members, refusing to join a gang, or simply to enhance gang members' reputations.[17]

Horrifying examples abound of innocent bystander victims accidentally caught in the crossfire or worse, intentionally sacrificed to preserve gang status or to send a message. For instance, in Nebraska, in 1990, five people were gunned down over six days in apparently gang-related shootings. The reason: no more than the necessity of "meeting one expectation associated with dangerous gangs: go out and find someone to hurt, even kill, if necessary and feasible."[18] In Los Angeles, in 1995, to the entire nation's horror, a local gang fired on a car returning from a barbecue but which had accidentally taken a wrong turn onto a dead-end street in Los Angeles's Cypress Park section. The gang fired on the car although they could "clearly see" that its pasengers were not rival gang members: the car's driver and a 2-year old boy were injured; his 3-year old sister was killed.[19] Or, from Chicago: in 1993, the powerful Latin Kings gang used gunfire and a Molotov cocktail against a home where a young gang member lived—to "send a message." Although the intended recipient was out, a 91-year old bedridden woman burned to death alive in his place.[20] Thus, gang violence

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15 Covey, *supra* note 10, at 34.

16 *Street Gangs and Crime*, *supra* note 11, at 13.

17 *Id.*

18 Covey, *supra* note 10, at 33.

19 *Id.*

20 George W. Knox and Thomas F. McCurrie, *Gang Profile: The Latin Kings*, 4 J. Gang. Res. 43, 53 (1996). More frighteningly, some Chicago gangs may even have infiltrated the ranks of police officers. From 1992 to 1995, at least 15 police officers who were active gang members from various gangs were charged with crimes and forced to resign. *Id.* at 54.

truly takes a toll beyond its own on the community's weakest and most innocent members.

Gangs are also disproportionately responsible for all violent youth offenses. For example, in Rochester, gang members self-reported committing 68% of all adolescent violent offenses: in Seattle, 85%, and in Denver, 89%.[21] In Rochester, while only a third of youths joined gangs, gang members were responsible for 65% of all delinquent acts, including 86% of all serious delinquent acts. That same third was responsible for 69% of all self-reported violent acts, 68% of all property crimes, 60% of public disorder crimes, and 70% of the drug sales. Even after incarceration, former gang members are likely to continue in careers of violence.[22]

Gangs are also intimately linked to more apparently mild street gang offenses, mostly involving graffiti or vandalism. Such ostensibly minor acts, however, may often actually also be precursors to serious turf-related gang violence; areas of significant vandalism and graffiti often tend to coincide with areas of greater violence.[23] To community residents, the net effect is the same: fear and intimidation.

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21 *See* Terence P. Thornberry and James H. Burch II, U.S. Dep't of Justice, *Gang Members and Delinquent Behavior* (1997) (discussing recent studies of gang member delinquency in Rochester, Seattle, and Denver); Covey, *supra* note 10, at 35 (citing studies).

22 Covey, *supra* note 10, at 35.

23 *Street Gangs and Crime*, *supra* note 11, at 14.

C. Increased Gang Presence And Violence Undermine Community Stability By Weakening Social Order-Preserving Mechanisms.

1. *Visible Community Disorder Induced By Gangs Reduces The Ordinary Reputational Price Of Crime, Discourages Private Enforcement Initiatives, And Engenders Disrespect For Existing Public Enforcement.*

Visible disorder is a "self-reinforcing cue" about the community's attitude toward crime. Potential lawbreakers infer that they are unlikely to be punished for more serious crime. Open disorder also conveys to individuals that their fellow community members are more likely to engage in such crime. In such an environment, individuals predisposed toward crime are much more likely to engage in it, because the deterrent price of crime has been lowered to the point of no longer deterring.[24]

Empirical studies bear out this relation, positively correlating disorder (physical and social) and robbery rates. Disorder invokes additional disorder: public drunkenness, prostitution, aggressive panhandling, and similar behavior signal that community members both engage in disorderly conduct, and that the community tolerates or is unable to enforce the basic norms of the community.[25]

Accordingly, the pervasive urban anxiety found in many neighborhoods likely results as much from fear of

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[24] *See* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va. L. Rev. 349, 368-71 (1997). This is Wilson & Kelling's "broken windows" theory: a community exhibiting broken windows invites more window breaking because it signals that no one in the community cares, so that breaking more windows appears to bring no social cost. *See* James Q. Wilson & George L. Kelling, *Making Neighborhoods Safe*, Atlantic Monthly, Mar. 1982, at 29; *see also* George L. Kelling & Catherine M. Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (1996).

[25] Kahan, *supra* note 24, at 370.

disorder as from the realistic likelihood that residents will be victims of serious crime. Signs of disorder prompt fearful residents to retreat inside and to avoid getting involved in the neighborhood's problems.[26]

Gang activity is like public disorder, because it drives some law-abiding citizens out of the community, while discouraging private enforcement efforts by those who remain. Those law-abiders who do remain are nevertheless more likely to avoid the streets, where their presence alone would help to deter crime. They are also more likely to distrust their neighbors, and less likely to join with them in community crime prevention and monitoring efforts. The law-abiders' fear of crime thus facilitates even more crime: when individuals perceive that gangs control the environment, they become less likely to cooperate with law-enforcement officials, fearing it to be "futile and dangerous." [27] Alternatively, gangs may often actively intimidate potential witnesses, backing up their threats with serious violence.[28] Gangs profit, and gain community legitimacy.

Visible gang disorder also engenders disrespect for existing public enforcement authorities that are made to appear ineffective. For example, a city attorney described a Los Angeles gang-ridden neighborhood before it obtained a civil abatement injunction: "All day long, gang members stand at intersections known for drug sales, wear pagers, dress in gang attire, flash handsigns, and wave at and approach passing vehicles and pedestrians for what are certainly offers to buy drugs," while officers could not arrest gang members for any of these

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[26] Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551, 580 (1997).

[27] Kahan, *supra* note 24, at 371-76.

[28] *See, e.g., Street Gangs and Crime*, *supra* note 11, at 13 (discussing Chicago gang retaliation on five victims for their willingness to testify against gang members).

"lawful" behaviors unless they observed an actual exchange of money for drugs. As a uniformed officer "typically observes only the lawful activity preceding the actual sale, officers must simply drive by in frustration while law-abiding citizens look on in disgust." [29]

Thus communities, once they become vulnerable to gangs, face the additional intractable hurdles of citizen withdrawal and cynicism over "ineffective" public law enforcement. Unfortunately, as well, once rampant crime inverts the ordinarily negative reputational effect of law-breaking, it can become increasingly self-sustaining: when juveniles see others committing crimes, they infer that their peers positively value law-breaking, and they are more likely to draw the same inference and engage in the same behavior.[30] The community's social fabric becomes increasingly distended.

2. *Vulnerable Communities Face A Self-Perpetuating Cycle Of Youth Gang Membership And Attendant Violence From Self-Reinforcing Perceptions Of High Criminality.*

Once gangs gain a foothold in a vulnerable community, their presence and activities serve as self-reinforcing preservation mechanisms, which work to build up the gang's social influence in the community. The probability of joining a juvenile gang is proportional to the existing level of juvenile gang activity in the neighborhood or community.[31]

Youth gang membership brings with it particular evils: youth gang members are often involved with drug use,

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[29] Los Angeles City Attorney Gang Prosecution Section, *Civil Gang Abatement: A Community Based Policing Tool of the Office of the Los Angeles Attorney, in The Modern Gang Reader* (Malcolm W. Klein et al. eds., 1995).

[30] Kahan, *supra* note 24, at 357-58.

[31] Covey, *supra* note 10, at 224.

drug trafficking, and violence.[32] Gangs also have a serious disruptive effect on schools and can seriously threaten students and staff members. Many illegal acts occur when gangs are active in the schools, including assaults, extortion, vandalism, gang wars, and drug sales. Furthermore, visible gang activity such as loitering may, by making youths aware of the option of gang membership, make it more likely that individuals will join juvenile gangs.[33]

Accordingly, some communities develop increasingly high levels of gang activity while others do not, depending on whether juveniles think that others esteem and expect gang membership. These perceptions become self-reinforcing: in low-crime neighborhoods, juveniles believe that others disvalue gang membership, making it less likely that they will join, while juveniles in high-crime neighborhoods, although just as likely to see gangs as "violent and destructive," are more likely to believe that their peers admire gang members.[34] That destructive belief engenders a cycle of gang membership with its attendant violence that is extremely difficult for an afflicted community to break.

D. Increased Gang Presence And Violence Pressure Many Law-Abiding Community Residents To Retreat Into Their Homes Or Fortress-Like Gated Communities, Leaving Neighborhoods Increasingly Vulnerable To A Downward Spiral Of Disorder.

Increased gang pervasiveness and violence have provoked further weakening of vulnerable communities. In 1995, 7% of households nationally reported crime was a neighborhood problem. Of those neighborhoods, 44% (3% of total) said the problem was so objectionable that they wished to move; twice as many of these were cen-

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[32] *OJJDP Fact Sheet*, *supra* note 4.

[33] Covey, *supra* note 10, at 28-30; *see also* Kahan, *supra* note 24, at 376.

[34] Kahan, *supra* note 24, at 372.

tral city households. These perceptions of neighborhood crime generally reflected actual crime victimization experience.[35]

Those who can't afford to move—often working class residents—retreat into their homes. For example, one recent study in Milwaukee found that although urban residents of poor neighborhoods had extensive kinship ties, less than one fifth of them felt their neighborhood was a "good place to live," and 52% said "they would move if they could." [36] Nevertheless, large numbers of working class African-American families still reside in these neighborhoods. Not all who want to leave can—so their neighborhoods "are a checkerboard of struggling working class and poor families, coexisting, even on the same block with drug houses, gangs, and routine violence." [37] Accordingly, there is a great deal of intra-community tension between these disparate groups. With a lack of effective community institutions, residents can "either ignore the gunshots in the night, arm themselves for self-protection, call '911'—or give in to the fear and despair by moving out." [38] "Respectable residents" who choose to remain confront "a growing street culture that increases community distrust of young people, victimizes neighborhood residents, and lures children into dangerous activities." [39]

Residents who can afford it, often do give in to "fear and despair" and move out. Law-abiding citizens are more likely to leave a neighborhood that is fraught with disorder. Their departure, however, begins a downward

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35 Carol J. DeFrances and Steven K. Smith, Bureau of Justice Statistics, U.S. Dep't of Justice, *Perceptions of Neighborhood Crime, 1995*, at 1 (1998).

36 John M. Hagedorn, *Gangs, Neighborhoods, and Public Policy, in The Modern Gang Reader*, *supra* note 29, at 316, 319.

37 *Id.*

38 *Id.* at 320.

39 *Id.*

spiral for the community: the increased concentration of law breakers multiplies their interactions with each other, further reinforcing each individual law breaker's own criminal propensities.[40]

For example, in the 1980s, William Julius Wilson documented the move of many black working class families and the growing middle class out of the ghetto into more desirable neighborhoods. Wilson argued, however, that this urban outmigration of the middle class, and particularly the minority middle class, from core cities to the suburbs, took away an important "social buffer," made up of "community networks of informal social control." [41] Those who remained faced ensuing social isolation from mainstream institutions, values, and role models. For example, one social scientist described the "child-rearing dilemma of 'decent' parents who wish to impart conventional values to their children, but are constrained by fear that the children may be taken advantage of by the street kids." [42] That isolation from mainstream values becomes a major factor contributing to weakened social control at the community or neighborhood level, with the end result of increasing the probability of gang formation.[43]

Alternatively, those who can afford it have begun to construct walls between themselves and their surroundings, retreating to gated communities—residential areas with restricted access in which normally public spaces are privatized—in search of a "social bulwark against the

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40 Kahan, *supra* note 24, at 371.

41 James F. Short, Jr., *Poverty, Ethnicity, and Violent Crime* 55 (1997) (citing William Julius Wilson, *The Truly Disadvantaged: The Inner City, The Underclass, and Public Policy* (1987)).

42 *Id.* at 56 (citing Elijah Anderson, *Violence and the Inner-City Poor* (1993)).

43 Covey, *supra* note 10, at 223.

general degradation of the urban social order." [44] While in 1985, there were only a handful of such "fortresses," in 1997, there are likely 20,000 gated communities with more than 3 million units.[45] This trend is fundamentally disturbing for any one who embraces democratic ideals—increasingly, society appears to be condoning one justice for those with money, and another sort for those without. We are abandoning both the civil republican ideals of our founding fathers and our cities, to violent gang influences. This is the greatest immediate threat to civil liberties confronting our urban communities.

II. ANTI-LOITERING ORDINANCES ARE A REASONABLE MIDDLE GROUND RESPONSE TO INCREASING GANG VIOLENCE THAT WORK BY SECURING PUBLIC ORDER NORMS AND STRENGTHENING THE ENTIRE COMMUNITY.

Nationwide, however, communities are increasingly taking steps to protect themselves and to resist the gang threat. When urban residents choose not to surrender, but rather, to enlist law enforcement resources to help them reclaim their communities, that effort should be lauded, supported, and emulated. Our communities must be empowered to react against the true threat to their civil standing from gang violence.

A. Nationwide, Communities Like Chicago Are Seeking New And Effective Ways To Resist The Increasingly Serious Threat Of Gang Violence.

Chicago is not alone in seeking to resist the devastating effects of gang violence. Having witnessed the failure of more traditional policing methods,[46] many other threat-

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[44] Edward J. Blakely and Mary Gail Snyder, *Fortress America: Gated Communities in the United States* (1997).

[45] *Id.*

[46] In the 1960s, police began to focus more on serious crimes, measured by the number of arrests made, than on lesser crimes. At the same time, however, communities began to feel less secure. As one Chicago police officer noted, "we are arresting more gang members than ever before; we are getting more convictions than ever before; and we are getting longer sentences than ever before. But ironically, we have more gangs than ever before." Pamela Irving Jackson, *The Police and Social Threat: Urban Transition, Youth Gangs, and Social Control, in Gangs and Gang Behavior* 447, 448 (G. Larry Mays ed., 1997) (quoting 1989 testimony of Frank Radke of the Chicago Police Department before a national conference on youth gangs).

ened localities—from Los Angeles to Washington, D.C.—have reacted by passing a variety of innovative laws, which range from curfew measures to anti-loitering statutes to court injunctions against specific gang members.[47] All of these measures emphasize prevention and deterrence strategies over increased criminal sanctions. In order to meet the particular challenges of increased gang violence, communities have also strongly supported constrained expansions of police discretion, to help communities reassert their own law-abiding norms.[48]

Community support for anti-loitering legislation has been broad, particularly in certain predominantly minority communities where street-level drug dealing is endemic.[49] One scholar argued that "to deny street officers the informal powers to act intuitively and spontaneously in the face of [neighborhood] problems cuts at the very heart of the police function as it has evolved in the neighborhood context." When police do not have the authority to break up youth gangs intimidating their neighbors by congregating on street corners, or to take seriously "the street harassmen and threatening behavior common in many poor neighborhoods," the "poor and powerless are then the

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[47] *See, e.g.*, Livingston, *supra* note 26, at 554-55 & nn.10-14 (citing various communities' experiences with civil injunctions, anti-loitering laws, and curfews).

[48] *See generally id.* (discussing shift toward increased police discretion).

[49] *Id.* at 623.

losers" as such offenses "are not perceived to be minor by the victims in the community." [50]

Residents of high crime-communities are much more likely to support gang-loitering ordinances, curfews, and other order-maintenance policies, which they perceive to be appropriately moderate yet effective devices for reducing crime.[51] Communities have implemented these policies in various ways, tailored to their particular needs, and depending on the pervasiveness of the problem. For example, one very small neighborhood, Norwalk, California, faced gang intimidation: gang members loitered during all hours, spread graffiti, trespassed, publicly urinated, used drugs and alcohol, and committed fire bombings. Predictably, residents frequently stayed inside, "ceding public streets and common areas to gang members and retreating to small homes and apartments where iron bars covered many windows," or just moved out of the neighborhood. The neighborhood successfully obtained an injunction against twenty-two named gang members.[52]

One small Los Angeles neighborhood has also successfully implemented order maintenance through civil abatement.[53] Again, in this case, police officers chose to obtain an injunction against specific gang members, enjoining them from committing certain gang-specific behaviors. Without civil gang abatement, uniformed police were unable to effectively enforce drug laws against street deal-

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[50] *Id.* at 581.

[51] *Id.* at 622-23.

[52] *See* Livingston, *supra* note 26, at 551; *City of Norwalk v. Orange Street Locos*, No. VC016746 (Cal. App. Dep't Super. Ct. Aug. 25, 1994) (issuing preliminary injunction against gang members, which remains in place).

[53] Other California neighborhoods have also chosen to implement order-maintenance policing through injunctions. *See People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997 (upholding injunction against gang-related conduct when gang's activities constituted a public nuisance in a particular neighborhood).

ers. Under civil gang abatement, however, police could prevent "imminent criminal activity by arresting people for prohibited patterns of conduct which are known to precede and facilitate these crimes." [54] Thus, officers could effectively impact a gang's drug profits, while simultaneously facilitating the community's effort to improve its quality of life for all its residents.

B. Order Maintenance Policing Effectively And Efficiently Deters And Prevents More Serious Crime By Reinforcing Extant Community Law-Abiding Norms.

Just as community disorder engenders increasing disorder and crime, reinforcement of extant community law-abiding norms engenders increasing social order and prevents more serious crime. Modern policing theory has undergone a "quiet revolution" to learn that, in cooperation with community efforts, enforcing community public order norms is one of the most effective means of combating all levels of crime.[55] By focusing on order maintenance and prevention, advocating a more visible presence in policed areas, and basing its legitimacy on the consent of policed populations, police can most effectively prevent the occurrence of more serious crime.

New York City's experience confirms this. Today, that city has much less crime than it did five years ago. From 1993 to 1996, the murder rate dropped by 40%, robberies dropped by 30% and burglary dropped by more than 25%, more than double the national average.[56] These drops are not the result of increased policed resources, but rather more effectively applied resources. While New York has not increased its law enforcement expenditures substantially more than other cities, since

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[54] Los Angeles City Attorney Gang Prosecution Section, *supra* note 29, at 326.

[55] Livingston, *supra* note 26, at 562.

[56] *See* Kahan, *supra* note 24, at 367-73 (discussing New York's rapid crime reduction as result of maintenance order policing).

1993, the city began to focus intensively on "public order" offenses, including vandalism, aggressive panhandling, public drunkenness, unlicensed vending, public urination, and prostitution. This focus on order maintenance is credited for much of the crime reduction.[57]

Dan Kahan describes this phenomenon in terms of social influence. He suggests that individuals' perceptions of each others' values and beliefs can affect their own conduct. Thus, individuals' decisions to commit crimes "interact with and reinforce each other in various ways." [58] In particular, individuals are much more likely to commit crimes when they perceive that criminal activity is widespread, because they infer a low risk of being caught or that there is little stigma or reputational cost to them. That is, where crime appears rampant, individuals are less likely to form moral aversions to criminality.

Under this view, the most cost-effective means of deterring crime may be laws that shape individuals' perceptions of each others' beliefs and intentions.[59] Accordingly, strict enforcement of aggressive panhandling, prostitution, open gang activity and other visible signs of disorder may be justifiable, in order to provide proper signals about the community's attitude toward more serious forms of lawbreaking. Order-maintenance strategy—"when citizens obey norms of orderliness—and when authorities visibly respond to those who do not"—clearly signals that the community will not tolerate criminal behavior. Law-abiders are reassured, and themselves induced to actively discourage crime. In this way, "perception of obedience to law becomes reality." [60]

Traditional law enforcement would rely heavily on infrequent convictions for more serious crimes with severe penalties attached, instead of focusing on a generally

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57 *Id.*

58 *Id.* at 350.

59 *Id.* at 351.

60 *Id.* at 371.

higher probability of conviction for lesser offenses. Kahan points out, however, that a low probability of arrest for serious crimes might suggest a high level of criminality. That perception would likely engender increased crime, and offset any efficiency gains secured by less frequent prosecution. Likewise, if the burden was placed on private citizens to defend themselves, their overt efforts might also convey a destructive message of widespread criminality. In such circumstances, it makes sense that public law enforcement should step in to reinforce community norms.[61]

C. Anti-Loitering Ordinances Reinforce Public Order Norms Of No Tolerance For Gang Activity.

Anti-loitering ordinances implement community-driven order maintenance policing citywide—appropriate to the extreme pervasiveness of Chicago's gang problem—but on a neighborhood scale. Preservation of neighborhood commons is essential to ensuring healthy and vital cities: "in vibrant neighborhoods, the peace and safety of public spaces are ordinarily kept not primarily by police, but by the people themselves." [62] Yet, where public order has begun to deteriorate, police intervention becomes increasingly necessary to "shore up" whatever sense of security remains.[63]

Gang loitering works to increase disorder. For example, a street where gang members loiter to conduct drug sales or even just to assert the boundaries of their turf is likely to experience decline, as law-abiding residents begin to see it "as a place where children should not play and where those with adequate resources should choose not to live." [64]

Gang anti-loitering regulations counteract that disorder by strengthening the community's social organization.

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61 *Id.* at 371.

62 Livingston, *supra* note 26, at 558-59 (citing Jane Jacobs, *The Death and Life of Great American Cities* 29-54 (1961)).

63 *Id.* at 559.

"[They] increase the relative supervisional authority of parents and other adults, who are more likely to transmit law-abiding values and dispositions to juveniles than are other juveniles. . . . These policies . . . reduce community residents' fear of crime, which in turn increases their willingness to join leagues with others in combating it." [65] "Gang criminality is driven by social influence. When juveniles see others openly associating for the purpose of committing crimes, they understandably perceive that that's a way of life their peers respect." [66] Suppressing open gang activity turns that social influence around.

In terms of social capital, the increased devotion of law enforcement resources helps to shift social capital from criminal gang members, who have co-opted it through intimidation, back to law-abiding citizens.[67] Those citizens can then participate in the transmission of those public order norms to their children, engendering a positive cycle of community involvement.[68]

D. Anti-Loitering Ordinances Strike An Effective Balance Because They Are More Efficient Than Harsher Penalties, With Fewer Economic And Social Costs To The Community.

Order-maintenance policing strikes a reasonable intermediate balance between harsh criminal penalties and inaction. Anti-loitering ordinances in particular represent a

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[64] *Id.* at 559.

[65] Dan M. Kahan, *Between Economics And Sociology: The New Path Of Deterrence*, 95 Mich. L. Rev. 2477, 2480 (1997) (citing Tracey Meares, *It's a Question of Connections*, 31 Val. U. L. Rev. 579 (1997)).

[66] *Id.* at 2488.

[67] *See generally* John Hagan, *Crime and Capitalization: Toward a Developmental Theory of Street Crime in America, in Developmental Theories of Crime and Delinquency* (Terence P. Thornberry ed., 1997) (discussing economic and social capital); Short, *supra* note 41 (discussing formation and weakening of social capital in gang-ridden neighborhoods).

[68] Kahan, *supra* note 65, at 2488.

middle ground solution "that deter[s] as well as or better than severe prison terms and that cost[s] much less." [69] They work effectively "without the need to resort to severe penalties for gang-related crime, a tactic that is costly for society, has a dismal track record, and destroys the communities from which gang members come." [70]

Conventional suppression strategies are ineffective in gang-threatened communities. Where gang activity is prevalent, individuals are more likely to act in an aggressive manner, in order to conform to gang norms of behavior. When numerous youths act according to these skewed norms, more are likely to turn to crime: widespread adoption of aggressive mannerisms sends skewed signals about public attitudes toward gang membership, and creates barriers to mainstream law-abiding society, which strongly disfavors aggression.[71]

Accordingly, policies that "raise the price" of gang activity can sometimes function at cross-purposes. If juveniles value willingness to break the law, delinquency may be seen as "status-enhancing." As penalties grow more severe, law-breaking gives increasing status. More severe punishments may also provoke unintended racist accusation, if community minorities view harsher penalties as unfairly applied to their particular groups. Thus, any strategy dependent on harsh penalties may in fact be "at war with itself." [72]

Strategies that instead attack public signals to juveniles' peers about the value of gang criminality are more effective. Gang anti-loitering laws do this, for example, by "authorizing police to disperse known gang members when they congregate in public places," or by "directly pro-

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[69] *Id.* at 2479.

[70] *Id.* at 2488.

[71] Kahan, *supra* note 24, at 374-75.

[72] *Id.* at 375.

hibiting individuals from displaying gang allegiance through distinctive gestures or clothing." [73] By preventing gangs from flaunting their authority, such laws establish community authority while combating the perception that gangs have high status. As that perception weakens, so does the pressure to join gangs that youths might otherwise perceive.[74]

Such strategies also positively influence law-abiding adults. Gang-loitering laws augment law-abiders' confidence so that they can oppose gangs. When public deterrence predominates, individuals are much less likely to perceive that criminality is widespread and much more likely to see private precautions as worthwhile. When the community as a whole is again able to express its condemnation, gang influence quickly wanes.[75]

E. The Ordinance Is An Integral Part Of Community-Wide Efforts To Resist Gangs.

The most successful anti-gang programs combine effective gang suppression programs with targeted community aid efforts: increased social services, job placement, and crisis intervention.[76] For example, Los Angeles' civil abatement program was part of a coordinated effort to significantly reduce illegal criminal activity, including various community-based policing efforts such as Neighborhood Watch, graffiti abatement, building abatements, at-risk youth identification, and employment recruitment as well as the more traditional law enforcement efforts. Civil gang abatement together with other government and community-based efforts has reduced crime, and visibly improved the neighborhood's quality of life.[77]

Chicago has also implemented alternative community aid programs. Since 1992, for example, the Gang Violence Reduction Project has targeted Little Village to serve as a model gang violence reduction program. The program coordinates increased levels of social services—the carrot—in conjunction with focused suppression strategies—the stick. The result has been a lower level of serious gang violence among the targeted gangs than among comparable gangs in the area. Importantly, as well, the project also noted improvement in residents' perceptions of gang crime and police effectiveness in dealing with it.[78] Chicago's anti-loitering ordinance is the necessary "stick" of an effective gang violence reduction equation.

CONCLUSION

Numerous social and economic reasons encourage youth to join gangs. Any community response cannot expect law enforcement by itself to resolve this entrenched problem. Community programs directed to remedying the lack of social and economic opportunities for at-risk youth can address the underlying effects. Nevertheless, any holistic community response must also reinforce positive community responses: law enforcement must be given the tools to support community initiatives to take back their neighborhoods.

Accordingly, we urge the court to reverse the judgment of the Supreme Court of Illinois. We note that the decision below invalidated the gang loitering ordinance in its entirety. Reversal of that decision would not foreclose "as-applied" challenges if particular individuals believe that

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[73] *Id.* at 376.

[74] *Id.* at 375-76.

[75] *Id.* at 376-77.

[76] *See* Short, *supra* note 41, at 194-98 (discussing successful programs coordinating both deterrence mechanisms and welfare provision).

[77] Los Angeles City Attorney Gang Prosecution Section, *supra* note 29, at 325.

[78] Thornberry & Burch, *supra* note 21, at 3.

the ordinance is being enforced against them in violation of the city's own implementing regulation or based upon some impermissible discrimination.

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AMICUS CURIÆ BRIEF ON THE MERITS IN SUPPORT OF THE CITY OF CHICAGO BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

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AMICUS CURIÆ BRIEF ON THE MERITS IN SUPPORT OF THE CITY OF CHICAGO BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

Amicus curiæ, Gil Garcetti, District Attorney for the County of Los Angeles, State of California, files this brief as the authorized law officer of the county, pursuant to the Court's Rule 37.4.[1]

1. Los Angeles County Charter § 25 (1995) states:
"Each County officer, Board or Commission shall have the powers and perform the duties now or hereafter prescribed by general law, and by this Charter, as to such officer, Board or Commission."
It is provided in the California *general law* that:
"The district attorney is the public prosecutor, except as otherwise provided by law.
"The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses." Cal. Government Code, § 26500 (West 1988).

INTEREST OF AMICUS CURIÆ

Nearly one fourth of the murders recently committed in California have been blamed on members of criminal street gangs. Cal. Gangs by the Next Millenium, at 7 (Cal. Dept. of Just., 1998). Figures maintained by the Los Angeles Police Department reflect that, in 1997 in the City of Los Angeles, more than a third of the criminal homicides were committed by members of criminal street gangs.[2] County-wide in Los Angeles County, the figures are even more alarming.[3] In 1990, the California Legislature declared that Los Angeles County led the nation in number of gang members.[4] Figures compiled by the Los Angeles County Sheriff now show that the county population includes more than 150,000 members of 1350 criminal street gangs.[5] The District Attorney bears the major

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2. See footnote 8, *post*.

3. Figures provided through the Hardcore Gang Division of the Los Angeles County District Attorney's Office from Captain James Mulvihill of Operation Safe Streets (OSS), the gang enforcement unit of the Los Angeles County Sheriff's Department, show that, in 1997, 42% of homicides in Los Angeles County were gang-related. Captain Mulvihill obtained the figures from GREAT, a Los Angeles County-wide computer database maintained by OSS under Captain Mulvihill's supervision. All police agencies in Los Angeles County input information into GREAT. The database is maintained for the use of law enforcement agencies.

4. Chapter 3.5, entitled "Gang Violence Suppression," of part 4, title 6 of the California Penal Code (West 1992), contains a number of findings, including this statement:

> "The Legislature hereby finds and declares the following:
>
> " . . . .
>
> " (4) Los Angeles currently leads the nation in the number of gang members and gang sites, the consumption of drugs, the amount of drugs confiscated, drug-related violent crimes, and has the greatest number of young people between 6 and 18 years of age who are 'at risk.'" Cal. Penal Code, § 13826.11(a)(4) (West 1992).

5. These figures were also obtained through GREAT. See fn. 3, *ante*.

responsibility in prosecuting gang members for crimes they commit in Los Angeles County.[6]

The District Attorney employs a special unit, with partial federal funding, designated to prosecute only crimes committed by hardcore gang members. See Cal. Penal Code, §§ 13826-13826.4, 13826.7 (West 1992, West Supp. 1998). Under California general law:[7]

> "The district attorney may sponsor, supervise, or participate in any project or program to improve the administration of justice." Cal. Government Code, § 26500.5 (West 1988).

Under this power, the district attorney has initiated and actively pursues county programs to reduce crime and turn youngsters from criminal careers. Thus, the district attorney has a special interest in an ordinance that requires the police to disperse loitering groups that include gang members likely to be involved in criminal activity.

The district attorney's mission includes an "obligation to enhance the fundamental right of the people of Los Angeles County to a safe and just society." Legal Policies Manual, *Mission Statement of the District Attorney's Office* (Los Angeles Co. Dist. Atty., 1998). Ordinances similar to § 8-4-015 of the Municipal Code of Chicago (added June 17, 1992) would, if adopted by municipalities in Los Angeles County, enhance this right of the people of the county by reducing more serious criminal activity. The district attorney believes the Constitution permits implementation of the Chicago ordinance and has an interest in a decision from the Court upholding the ordinance.

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6. See footnote 1, *ante*.

7. See footnote 1, *ante*.

SUMMARY OF ARGUMENT

The Chicago ordinance is a constitutionally enforceable statute aimed at a particular evil, namely, loitering criminal street gangs--gangs that suck the vitality from the city's neighborhoods and public places and personally intimidate its citizens. In *Griffin* v. *Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987), the Court recognized the existence of "'special needs' beyond normal law enforcement," *id.*, 483 U.S. at 873-874, that may constitutionally impinge upon rights normally given greater protection by the Court. But the threat that criminal street gangs present to public safety and the quality of life in neighborhoods in Chicago necessitates dispersal of loitering gangs of street criminals in situations only where the Court has otherwise been protective of rights "not mentioned in the Constitution or in the Bill of Rights." *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 164, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).

Despite the Illinois Supreme Court's contrary pronouncement, the Chicago ordinance does not make loitering a crime; the operative paragraph of the ordinance consists of a sentence imposing upon a police officer a duty to issue an order dispersing loitering gang members and associates, and a second sentence making a crime only of failure to obey the police order. See Chicago Muni. Code, § 8-4-015(a). The Constitution permits prosecution under the second sentence, assuming the lawfulness of the order, see *Cox* v. *Louisiana*, 379 U.S. 536, 551, 85 S.Ct. 453, 13 L.Ed.2d 417 (1965); and the special need to preserve public safety and improve the quality of life for the community justifies imposing such a duty upon the police. No person subject to such an order need fret over the meaning of the word *loiter*--prosecution results only from failure to disperse on order of the police. And no police officer initiating such an order will have a very difficult time identifying a group subject to such an order--members of criminal street gangs notoriously advertise their membership to effect the gang's purposes. See, *e.g.*, *People* v. *Gardeley*, 14 Cal.4th 605, 613, 59 Cal.Rptr. 356, 927 P.2d 713 (1996).

The Chicago ordinance provides an attractive alternative to the injunctive process currently utilized by some California municipalities as a means of curbing the criminal street gang menace. See, *e.g.*, *People ex rel. Gallo* v. *Acuna*, 14 Cal.4th 1090, 60 Cal.Rptr.2d 277, 929 P.2d 596 (1997). Such an ordinance and anti-gang injunctions may also usefully supplement one another.

ARGUMENT

I. THE ORDINANCE'S FIRST SENTENCE ESTABLISHES A POLICE DUTY

The operative subsection of the Chicago ordinance contains but two sentences. The first states:

> "Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more persons, he shall order all such persons to disperse and remove themselves from the area." Chicago Muni. Code, § 8-4-015(a).

Another subsection defines *criminal street gang*:

> "[It] means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." *Id.*, § 8-4-015(b)(2).

Subsection 8-4-015(b)(3) contains a list of crimes mostly involving violence and narcotics trafficking. Thus, the ordinance imposes a duty upon Chicago police officers, who shall order dispersal and removal of certain loitering persons reasonably likely to be involved in serious criminal activity, i.e., any person loitering in a group reasonably believed to include a criminal street gang member.

II. THE ORDINANCE CONSTITUTIONALLY IMPOSES AND DEFINES THE DUTY

A. The Evil Is Real

As the Illinois Supreme Court here observed:

> "Criminal street gangs are an expanding cancer in our society and their illegal activities endanger the safety of many law-abiding citizens." *City of Chicago* v. *Morales*, 177 Ill.2d 440, 227 Ill.Dec. 130, 687 N.E.2d 53, 64 (1997).

That court agreed the "problem" requires abatement. *Id.*, 687 N.E.2d at 64. Clearly, it does when one considers figures, such as those supplied by the Los Angeles Police Department, indicating that in 1997, members of criminal street gangs were responsible for more than a third of the criminal homicides committed in the City of Los Angeles.[8]

But the issue is not solely public safety; it includes the community's quality of life--the activities of criminal street gangs in a neighborhood can result in the residents becoming "prisoners in their own homes." *People ex rel. Gallo* v. *Acuna*, *supra*, 14 Cal.4th at 1100. Such was the case, as recently described by the California Supreme Court, in the San Jose neighborhood of Rocksprings:

> "Gang members, all of whom live elsewhere, congregate on lawns, on sidewalks, and in front of apartment complexes at all hours of the day and night. They display a casual contempt for notions of law, order, and decency--openly drinking, smoking dope, sniffing toluene, and even snorting cocaine laid out in neat lines on the hoods of residents'cars. The people who live in Rocksprings are subjected to loud talk, loud music, vulgarity, profanity, brutality, fistfights

8. The actual percentage for 1997 was 33.6. Detective Paul Glasgow of the Los Angeles Police Department provided this percentage based upon official records he maintains for that department's Detective Support Division. The same records show that in 1996, gang members committed 37.7% of that city's homicides and, in 1995, 45.2%.

> and the sound of gunfire echoing in the streets. Gang members take over sidewalks, driveways, carports, apartment parking areas, and impede traffic on the public thoroughfares to conduct their drive-up drug bazaar. Murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson, and theft are commonplace. The community has become a staging area for gang-related violence and a dumping ground for the weapons and instrumentalities of crime once the deed is done. Area residents have had their garages used as urinals; their homes commandeered as escape routes; their walls, fences, garage doors, sidewalks, and even their vehicles turned into a sullen canvas of gang graffiti. [¶] The people of this community are prisoners in their own homes. Violence and the threat of violence are constant. Residents remain indoors, especially at night. They do not allow their children to play outside. Strangers wearing the wrong color clothing are at risk. Relatives and friends refuse to visit. The laundry rooms, the trash dumpsters, the residents' vehicles, and their parking spaces are used to deal and stash drugs. Verbal harassment, physical intimidation, threats of retaliation, and retaliation are the likely fate of anyone who complains about the gang's illegal activities or tells police where drugs may be hidden." *Ibid.*

The appendices attached to the petition for certiorari reflect a concern of the lower Illinois courts that the Chicago ordinance would apply when a social worker or a family member is talking to a gang member. (See App. B, at 27a.) But such concerns pale when, as here (and in, *e.g.*, Rocksprings, see *ante*), the intimidation and control of a neighborhood by criminal street gangs is the evil sought to be remedied. The presence of a gang member's relative or social worker among those loitering outside a residence or business or in an apartment parking area adds nothing to the comfort level of law-abiding neighbors. See, *e.g.*, *People* v. *Green*, 31 Cal.App.4th 1001, 1007, 38 Cal.Rptr.2d 401 (1995) (gang members "sprayed a populated intersection with

bullets" in gang retaliation shooting); but see *People* v. *Franco*, 24 Cal.App.4th 1528, 1534, 30 Cal.Rptr.2d 478 (1994) (gang members decide not to shoot rival gang member with his mother and aunts "because [he] was walking with grown ladies").

Chicago has a vital interest in the quality of the life of its citizens. *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 50, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Section 8-4-015 of its municipal code protects that interest.

B. The Operational Standards In The Ordinance Are Constitutionally Drawn

1. Establishing a reasonable belief that a person belongs to a criminal street gang is practicable

Generally, members of criminal street gangs are readily susceptible of identification. The Chicago Police Department's guidelines for enforcement of the instant ordinance demonstrates the methodology. As reflected therein, the police department maintains a Gang Information File, for the purpose of identifying gangs and gang members. See Chicago P.D. General Ord. No. 92-4, § III.A. (1992). Gang members are frequently identified through their own admissions of membership. See, *e.g.*, *People* v. *Louen*, 17 Cal.4th 1, 6, 69 Cal.Rptr.2d 776, 947 P.2d 1313 (1997); *People* v. *Gardeley*, *supra*, 14 Cal.4th at 611, 612, 620.[9] Indeed, advertisement of gang membership is a useful part of the

9. However, in a chapter entitled Street Elite, Professor Katz has noted: "An inside joke that has been shared by field investigators over several decades is that subjects freely refer to their enemies as members of gangs but instruct an observing sociologist that their collective commitment is to a 'club,' an 'organization,' a 'clique,' a 'barrio,' a 'mob,' a 'brotherhood,' a 'family,' an ethnic 'nation,' a 'team,' or a 'crew.' Often, they expressly deny membership in a 'gang.'" J. Katz, Seductions of Crime, at 115 (Basic Books, 1988).

See also *People* v. *Munoz*, 157 Cal.App.3d 999, 1010-1012, 204 Cal.Rptr. 271 (1984) (trial court requires prosecutor's cross-examination on gang membership to omit use of the word *gang*).

intimidation involved in controlling a neighborhood, or may assist in maintaining gang membership. See *Gardeley*, 14 Cal.4th at 613.[10]

> "[T]he 'expressive' aspect of gang violence involves impulsive and emotional defense of one's identity as a gang member, defense of the gang and gang members, defense and glorification of the gang's reputation, and recruitment of gang members." J. Howell, *Youth Gang Drug Trafficking and Homicide: Policy and Program Implications*, 4 Juv. Just. No. 2, p. 14 (Dept. of Just., 1997).

Clothing, tatoos or other markings are often gang-specific, as are signals between members.[11] See, *e.g.*, *People* v. *Louen*,

10. In *Gardeley*, the California Supreme Court summarized a portion of the testimony of a police gang expert, as follows:

> "Detective Boyd explained: It is common practice for several gang members acting in concert to assault a person in full view of residents of an area where the gang sells drugs. Such attacks serve to intimidate the residents and to dissuade them from reporting the gang's drug-dealing activities to police. Gang members typically view a dispute or argument with someone who is not a member of the gang as a 'challenge' to the gang's authority, and they respond by trying to 'dominate' the person physically, that is, they might 'beat the person senseless, throw rocks over his head, kick him' and do this 'where a lot of people can witness it.' When gang members 'terrorize people . . . [who] have to live there,' the 'fear factor' allows the gang to 'go right back to dope dealing' day after day in the same area." *People* v. *Gardeley*, *supra*, 14 Cal.4th at 613.

Professor Katz describes the gang practice of *parading* as "a process of walking in apparent unison past a relatively stationary public while displaying 'colors' or other insignia of membership in a diffusely threatening group," J. Katz, *op. cit. supra*, 142, or "when members pace about a public location, gesturing defiance and shouting insults at will." *Id.* at 143. Professor Katz further notes "that the mass media's coverage of 'gang activities' is a powerful stimulus to members' involvement." *Id.* at 144.

11. The name of a gang on a t-shirt contributed evidence of gang membership in *People* v. *Gamez*, 235 Cal.App.3d 957, 963, 286 Cal.Rptr. 894 (1991), disapproved on a legal issue in *People* v. *Gardeley*, *supra*, 14 Cal.4th at 624, fn. 14. Professor Katz states:

(continued...)

supra, 17 Cal.4th at 6. Reliable information from a third party may also identify a gang member.

Given the wealth of objective criteria, the courts can easily test a police decision to issue a dispersal order on a case-by-case basis. Absent the existence of any such objective criteria, the police could hardly justify such an order; the presence of objective criteria should justify it. Cf. *Whren* v. *United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Of course, upon consideration of the statutory defense, see Chicago Muni. Code, § 8-4-015(b), the final decision on whether a member of the loitering group actually belongs to a criminal street gang is, as are similar questions in any criminal prosecution, a question for the trier of ultimate fact. See, *e.g.*, *People* v. *Gamez*, *supra*, 235 Cal.App.3d at 980, opn. of Wallin, J., conc. in the result.

2. **The ordinance constitutionally discourages remaining in a public place (1) with a criminal street gang member *only* when done with no apparent purpose and (2) with no apparent purpose *only* when with a criminal street gang member**

The ordinance defines *loiter* as "to remain in one place with no apparent purpose." Chicago Muni. Code, § 8-4-015(c)(1). The

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11. (...continued)

". . . West Coast barrio warriors (and some black groups as well) use the strikingly simple sartorial device of an upturned bill on a cap to signify membership in a 'bad' group. The barrio name is commonly painted on the underside of the brim, and circular letters in the barrio's name frequently are drawn and punctuated to suggest eyes. When turned up, the bill of the cap has the 'bad' youth peering down on passers-by with a collective identity drawn from underneath." J. Katz, *op. cit. supra*, 136-137.

Professor Katz is a sociologist. Presumably, a city police officer could provide a variety of indicia of gang membership appropriate to local criminal street gang cultures. Cf., e.g., *People* v. *McDaniels*, 107 Cal.App.3d 898, 904, 166 Cal.Rptr. 12 (1980) (Los Angeles Co. Dep. Sheriff made effort as part of his duties "to study the social customs, methods of operation of gangs in south central Los Angeles").

first sentence of § 8-4-015(a), which creates the police duty, uses the word *loitering*, as thus defined. Accordingly, the ordinance discourages (1) remaining in a public place with a criminal street gang member, *only* when done with no apparent purpose and (2) remaining in a public place with no apparent purpose *only* when with a criminal street gang member. Thus, so far as the Chicago ordinance is concerned, one can loiter with impunity so long as not in the company of a member of a criminal street gang. And, at least under the ordinance, when a purpose is apparent, one can remain in a public place with a member of a criminal street gang without police interdiction.

As a practical matter, to avoid a police dispersal order, persons who wish to remain in a public place ***with a person whom the police reasonably believe to be a member of a criminal street gang*** may make their purpose apparent upon contact with the police.[12] The importance of abating the "expanding cancer," *City of Chicago* v. *Morales*, *supra*, 687 N.E.2d at 64, justifies that inconvenience. Cf. *Michigan Dept. of State Police* v. *Sitz*, 496 U.S. 444, 450, 455, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990) (justifying governmental interference with freedom of movement vis-a-vis, here, the freedom to loiter). The purpose thus made known, the ordinance provides no further justification for police action.

By requiring police to disperse only loiterers who belong to and associate with criminal street gangs, the Chicago ordinance addresses itself to a narrow group of persons whose loitering, under the City Council's findings (and also apart from them), saps the city's neighborhoods of vital strength. With this limitation, the Chicago ordinance distinguishes itself from anti-loitering statutes held unconstitutional by the Court. Cf. *Boos* v. *Barry*, 485 U.S. 312, 331-332, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (restriction of anti-congregation statute to "groups posing a

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12. In addition, assuming any prosecution after disobedience to an order to disperse, it is an affirmative defense to the charge that no one in the group belonged to a criminal street gang. Chicago Muni. Code, § 8-4-015(b).

security threat," 485 U.S. at 331, satisfies 1st Amend.); *Colten* v. *Kentucky*, 407 U.S. 104, 110, 92 S.Ct 1953, 32 L.Ed.2d 584 (1972) (conviction under statute punishing disobedience of dispersal order when congregating in public place with "intent of causing inconvenience, annoyance or alarm," *ibid*., withstands 1st and 14th Amends.).

III. THE ORDINANCE'S SECOND SENTENCE PLAINLY CREATES A CRIME RESULTING FROM REFUSAL TO OBEY A POLICE OFFICER'S ORDER TO DISPERSE

"[T]here is no place for violence in a democratic society dedicated to liberty under law . . . ." *Cox* v. *Louisiana*, 379 U.S. 559, 574, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965).

> "The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." *Cox* v. *Louisiana*, *supra*, 379 U.S. 536, 554.

The violence inflicted upon society by the presence of criminal street gangs cannot credibly be denied. It is in part to avert such violence that the Chicago City Council approved § 8-4-015, requiring the police to order dispersal of loitering members and associates of such gangs. But an unenforceable order could hardly serve the purpose. Accordingly, the second sentence of the operative portion of the Chicago ordinance states:

> "Any person who does not promptly obey such an order is in violation of this section." Chicago Muni. Code, § 8-4-015(a).

Thus, while the first sentence of subsection 8-4-015(a) creates a police duty to dispel certain loitering, the second generally makes refusal to obey the order a crime. The elements of the crime are: (1) a police order to disperse and remove from an area, and (2) failure to promptly obey. It is in the ordinance, however, explicitly a defense that none of the disobedient loiterers belonged to a criminal street gang. § 8-4-015(b).

In *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965), the Court in dicta described an ordinance that made it an offense "to refuse or fail to comply with any lawful order, signal or direction of a police officer" as "so broad as to evoke constitutional doubts of the utmost gravity." 382 U.S. at 93. In making this statement, the Court in *Shuttlesworth* referred to a portion of its opinion concerning another part of the same statute, in which the Court cited to the concurring portion of an opinion of Justice Black in *Cox* v. *Louisiana*, *supra*, 379 U.S. 536, 559, 579. But in *Cox*, the Court had under review another ordinance, the violation of which consisted of two elements, and a majority of the Court described the second element--consisting of "a refusal to move on after having been ordered to do so by a law enforcement officer," *id*. at 551--as "narrow and specific," *ibid*., and, thus, presumably constitutionally drawn. See *ibid*.

While the Illinois Supreme Court stated below, "The ordinance seeks to criminalize acts of 'loitering' in a public place," *City of Chicago* v. *Morales*, 117 Ill.2d 440, 687 N.E.2d 53, 60 (1997), the ordinance does no such thing; to say that it does reveals a failure to read fairly its plain language. The ordinance does not make a crime of *loitering*;[13] it does make a crime of the failure to obey the dispersal order of a police officer. While the Illinois court erroneously felt *loiter* an inadequate term "to inform a citizen of its criminal implications," 687 N.E.2d at 61, any citizen subject to such a police order need not reflect at all upon the word *loiter* or its definition in the ordinance; the criminal act is in the refusal to obey the order. Cf. *City of Houston* v. *Hill*, 482 U.S. 451, 463, n. 11, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987); *Colten* v. *Kentucky*, *supra*, 407 U.S. at 110.

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13. The Illinois Supreme Court notes elsewhere in its opinion that, "literally read, the gang loitering ordinance does not prohibit loitering with a criminal street gang member," *City of Chicago* v. *Morales*, 687 N.E.2d at 62, although that court uses this statement merely to emphasize that what is at issue is not actual gang membership, but a police officer's "reasonable belief that one person in a group of loiterers is a gang member." *Ibid*.

IV. A POLICE ORDER UNDER THE CHICAGO ORDINANCE ADDRESSES LOITERING THAT IS PARTICULARLY PROVOCATIVE OF VIOLENCE

The evident purpose of the Chicago ordinance may be gleaned from its plain language. The purpose has to do not with encouraging arrests and prosecutions, but with dispersal of loitering street gang members and their associates, distinguishing it from the ordinance under review in *Papachristou* v. *City of Jacksonville*, *supra*, 405 U.S. 156. The Chicago ordinance seeks prevention by removing a likely source/target (see *post*) of criminal activity and neighborhood blight. While the Court in *Papachristou* described loafing and loitering, *themselves* arrestable and prosecutable under the Jacksonville (but not the Chicago) ordinance, as "historically part of the amenities of life as we have known them," *id.*, 405 U.S. at 164, surely those amenities must be afforded to the law-abiding citizenry and not just to gang members; but in Los Angeles and San Jose, as in Chicago, the threatening presence of the latter persuades the remainder of the citizenry to stay indoors. See, *e.g.*, *People ex rel. Gallo* v. *Acuna*, *supra*, 14 Cal.4th at 1100.

The Chicago City Council gave reasons for imposing this dispersal duty on the police: (1) an increase in the city's murder rate and other violent crimes, and in drug-related crimes; (2) intimidation of law abiding citizens by the expansion of a street gang presence in public places; (3) control by criminal street gangs over certain areas of the city through loitering and intimidation in those areas; (4) gang maintenance of such control while loitering, even in the presence of the police, caused by suspension of other criminal activity upon arrival of the police; (5) threats to persons and property in such areas from loitering criminal street gangs; (6) an interest in discouraging others from loitering with members of such gangs; and (7) a need for aggressive action to preserve the city's streets and public places for the safe use of the public. See preamble to Substitute Ord. adding § 8-4-015 to Chicago Muni. Code.

"The factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). No reason appears for applying any different rule to these findings of the Chicago City Council concerning the impact of criminal street gang loitering in the public areas of the city. If accepted, these findings of the city council justify the Illinois Supreme Court's agreement with the need to abate the problem thus presented. See *City of Chicago* v. *Morales*, *supra*, 687 N.E.2d at 64.

The problem extends beyond the safety of law-abiding citizens victimized by the gangs. A group that includes a gang member itself is a prime target for the infliction of violence by a rival gang. See, *e.g.*, *Gutierrez* v. *Superior Court*, 24 Cal.App.4th 153, 156, 29 Cal.Rptr.2d 376 (1994); cf. *People* v. *Rand*, 37 Cal.App.4th 999, 44 Cal.Rptr.2d 686 (1995); but see *People* v. *Franco*, *supra*, 24 Cal.App.4th at 1534. Researchers in a 1996 St. Louis study "found most gang violence, including homicides, to be 'expressive,' retaliatory, or situationally spontaneous":

> "Although some violence was related to protecting drug turf and disciplining customers, most erupted over seemingly petty acts--disrespecting gang colors, stepping in front of another person, flashing gang hand signs, or driving through a rival neighborhood. 'Whatever the "purpose" of violence, it often leads to retaliation and revenge creating a feedback loop where each killing requires a new killing' [citation]." J. Howell, *op. cit. supra*, 12.

See, *e.g.*, *People* v. *Muniz*, 16 Cal.App.4th 1083, 1085-1086, 20 Cal.Rptr.2d 460 (1993) (gang member on his way to do pay back shooting with no particular victim in mind). In a 1996 Chicago study, researchers found "a 'marauder' pattern is common, in which members of rival gangs travel to the hub of their enemy's territory in search of potential victims." J. Howell, *op. cit. supra*, 14.

Thus, the Chicago ordinance's requirement that police disperse a *loitering* group that includes a criminal street gang member

protects public safety, even where the group also includes a relative of the gang member, or a social worker assigned to work with gangs. See, *e.g.*, *People* v. *Magana*, 17 Cal.App.4th 1371, 1374, 22 Cal.Rptr.2d 59 (1993) (killing of gang member's 7 yr. old son leads to retaliatory gang shooting of infant and others). Such a loitering group, and nearby innocent bystanders, *will* be at greater risk than a similar group (and bystanders) that includes no such gang member. In this light, the Chicago City Council's legislation rationally attacks the problem recognized by the Illinois Supreme Court, but which that court evidently felt the Constitution rendered the city council powerless to address.

V. THE NEED TO ABATE THE GANG MENACE JUSTIFIES SPECIAL LIMITATIONS ON LOITERING WITH CRIMINAL STREET GANGS

In *Griffin* v. *Wisconsin*, *supra*, 483 U.S. 868, the Court wrote of "'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." 483 U.S. at 873-874. Speaking of probation, the Court said, "Recent research suggests that more intensive supervision can reduce recidivism," *id*. at 875, and that such supervision "is a 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." *Ibid*. The loitering criminal street gang, as defined in § 8-4-015(c)(2) of the Chicago ordinance, also creates a special need, justifying police interdiction before the ripening of normal probable cause that would validate an arrest. The special need here is to protect from violence not only the gang member but innocent bystanders, see pt. IV, *ante*, and to encourage law-abiding citizens to retake the city's public places.

The ordinance requires the police neither to search nor to arrest, but rather to order dispersal and removal of the loitering group. The rights implicated in Chicago's ordinance, if any, are those "not mentioned in the Constitution or in the Bill of Rights." *Papachristou* v. *City of Jacksonville*, *supra*, 405 U.S.

at 164. The state's intrusion on protected rights being non-existent, or at least substantially less than that involved in a search or arrest, the accompanying burden on the state is accordingly less to justify the officer's order. Cf., *e.g.*, *Michigan Dept. of State Police* v. *Sitz*, *supra*, 496 U.S. at 450, 455; *Veronia School Dist. 47J* v. *Acton*, 515 U.S. 646, 673, 115 S.Ct. 2386, 132 L.Ed.2d 564, (1995), dis. opn. of O'Connor, J. (police cannot "subject to drug testing every person entering or leaving a certain drug-ridden neighborhood in order to find evidence of crime"). Chicago has a compelling interest in intervention before the publicly loitering gang further damages the neighborhood or becomes itself a target of violent criminal activity (as in, *e.g.*, *People* v. *Flores*, 7 Cal.App.4th 1350, 1354-1355, 9 Cal.Rptr.2d 754 (1992) (gang shooting of "some guys" from a rival gang standing by a house). Cf. *Griffin* v. *Wisconsin*, *supra*, 483 U.S. at 879 (normal constitutional requirements yield to need to prevent damage to probationer or society).

In *Papachristou* v. *City of Jacksonville*, *supra*, 405 U.S. at 171, the Court described as too extravagant an implicit presumption, resulting from enforcement of the Jacksonville vagrancy ordinance there under consideration, "that crime is being nipped in the bud." *Ibid*. The ordinance, as described by the Court, allowed arrest and prosecution merely of "people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or who look suspicious to the police." *Ibid*. The Court's concern appears to have been that the Jacksonville ordinance was incapable of "even-handed administration," *ibid*., such that minorities and the poor would bear the brunt of its enforcement. See *ibid*.

But while the Court described the implicit presumption associated with the Jacksonville ordinance as "too extravagant to deserve extended treatment," *Papachristou* v. *City of Jacksonville*, *supra*, 405 U.S. at 171, the presumption underlying the Chicago ordinance--that loitering members of criminal street gangs and their associates create a serious social problem that encourages and depends upon public criminality--is too *clear* "to deserve

extended treatment." *Ibid.* A successful prosecution under the ordinance depends upon (1) the actual presence of a member of a criminal street gang in the loitering group, see Chicago Muni. Code, § 8-4-015(b); and (2) the *refusal* to obey a police dispersal order, see *id.*, § 8-4-015(a). While under the Jacksonville ordinance, the target's choice of an idle etc. (but non-criminal) lifestyle may have affected police enforcement, recognition of (1) the *criminal* lifestyle of the Chicago ordinance's primary targets, that is, those whom the police must reasonably believe to be members of criminal street gangs; (2) the constitutionally unprotected purposes for which they congregate in public places, and (3) the violence their loitering provokes from rival gangs constitutionally justify enforcement of the Chicago ordinance.

VI. THE CHICAGO ORDINANCE OFFERS BENEFITS BEYOND THOSE OF ANTI-GANG INJUNCTIONS

The California Supreme Court has approved the use of injunctions to curb certain ostensibly non-criminal activities of criminal street gangs as public nuisances. *People ex rel. Gallo* v. *Acuna*, *supra*, 14 Cal.4th 1090. The use of such power depends upon a showing of a particular actual or threatened interference with property or rights. See *id.*, at 1107, discussing *In re Debs*, 158 U.S. 564, 15 S.Ct. 900, 39 L.Ed. 1092 (1895).

> "Acts or conduct which qualify as public nuisances are enjoinable as civil wrongs *or* prosecutable as criminal misdemeanors, a characteristic that derives not from their status as independent crimes, but from their inherent tendency to injure or interfere with the community's exercise and enjoyment of rights common to the public." *People ex rel. Gallo* v. *Acuna*, *supra*, 14 Cal.4th at 1108-1109.

A judicial injunction "does not embody the broad and abstract commands of a statute." *People ex rel. Gallo* v. *Acuna*, *supra*, 14 Cal.4th at 1114. "Instead, it is the product of a concrete

judicial proceeding prompted by particular events," *ibid.*, usually requiring aggressive litigation and issuing thereafter. *Ibid.* The California Supreme Court related some of the evidence in *Gallo*, as follows:

> "One Rocksprings resident recounted an incident in which gang members had threatened to cut out the tongue of her nine-year-old daughter if she talked to the police; she stated that other residents had been threatened as well. Another resident reported her neighbor's property had been vandalized and the resident threatened after complaining to police that gang members had urinated in her garage. A police officer declared Rocksprings residents had told him gang members confront and threaten them with physical violence when asked to leave residential property. Others refused to furnish declarations, fearing for their lives if any gang member should discover their identities." *Id.* at 1118-1119.

These recitations illustrate an obvious weakness of the injunctive process in comparison with the Chicago ordinance. In California, the residents of the Rocksprings neighborhood had to suffer without relief before and while San Jose authorities litigated injunctive relief against the gang. San Jose will have to seek a new injunction if the enjoined gang merely moves its activities to the streets of another neighborhood. Even within a neighborhood, new recruits to a gang or gang members otherwise unidentified in the injunction may take the place of the enjoined members.

Furthermore, just as the delay inherent in obtaining a probable cause warrant contributed to departure from the usual warrant requirement in the search situation described in *Griffin* v. *Wisconsin*, *supra*, 483 U.S. at 876, so also the injunction process falls short in the need to promptly disperse an already menacing criminal street gang. Finally, this Court (and, hence, also lower courts) may scrutinize an injunction more closely than an ordinance. *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753, 764-766, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994).

However, the injunction can supplement the effect of an ordinance like Chicago's. For example, while a police order under the ordinance might disperse a loitering group of gang members and associates, violation of an injunction might justify an arrest of a dispersing gang member. An injunction may "afford more precise relief." *Madsen* v. *Women's Health Center, Inc.*, *supra*, 512 U.S. at 765. No reason appears why the government should be limited to one or the other.

CONCLUSION

The Chicago ordinance is constitutionally selective in its targets; gang violence is not. The Court should reverse the judgment of the Illinois Supreme Court finding the Chicago ordinance unconstitutional.

Respectfully submitted,

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City of Chicago,
Petitioner,

v.

Jesus Morales, *et al.*,
Respondents

On Writ of Certiorari to the
Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE RESPONDENTS

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QUESTIONS PRESENTED

Is Chicago's Gang Congregation Ordinance void for vagueness, an unjustifiable restraint of personal liberty in violation of the Fourteenth Amendment, or an authorization of unreasonable searches and seizures in violation of the Fourth Amendment?

INTEREST OF AMICUS CURIAE

Founded in 1958, the National Association of Criminal Defense Lawyers is one of the nation's leading organizations advancing the mission of criminal defense lawyers to ensure justice and due process for persons accused and convicted of crime. NACDL's mission, as defined in its bylaws, is to "[e]nsure justice and due process for persons accused of crime . . . [f]oster the integrity, independence and expertise of the criminal defense profession . . . and [p]romote the proper and fair administration of justice". NACDL has almost 10,000 members nationwide -- along with 80 state and local affiliate organizations representing another 28,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL has appeared before this court on many occasions as *amicus curiae*.[1]

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1. Both parties have consented to NACDL's appearance in this matter as *amicus curiae*. No counsel for any party has authored this brief in whole or in part and no person or entity, other than *amicus curiae*, has made a monetary

STATEMENT OF THE CASE

On June 17, 1992, the City of Chicago adopted a "Gang Congregation Ordinance" ("the ordinance"). The ordinance provides:

> Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

Chi. Mun. Code § 8-4-015(a).

Section 8-4-015(c)(1) defines "loiter" as "to remain in any one place with no apparent purpose." Section 8-4-015(c)(2) defines "criminal street gang" as "any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more" enumerated criminal acts, "and whose members individually or collectively, engage in or have engaged in a pattern of criminal gang activity." Section 8-4-015(c)(5) defines "public place" as "the public way and any other location open to the public, whether publicly or privately owned."

The Chicago Police Department began enforcing the ordinance under a general order issued on August 8, 1992.

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contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

See Chicago v. Morales, 687 N.E.2d 53, 59 (Ill. 1997). Enforcement was suspended when the state Court of Appeals declared the ordinance unconstitutional in December, 1995. *See Chicago v. Youkhana*, 660 N.E.2d 34 (Ill. App. 1995). In the forty-one months of enforcement, the Chicago police arrested about 43,000 individuals on the authority of the ordinance. Richard M. Daley & Terry G. Hillard, **Gang and Narcotic Related Violent Crime, City of Chicago 1993-1997** at 7 (June 19, 1998).

The Illinois Court of Appeals unanimously held that the ordinance violated the First Amendment overbreadth doctrine, the Illinois state constitutional right to peaceable assembly, the Fourteenth Amendment void-for-vagueness doctrine, the Eighth Amendment's prohibition on status offenses, and the Fourth Amendment. *Chicago v. Youkhana, supra*. The Illinois Supreme Court unanimously affirmed, holding that the ordinance is void for vagueness and a violation of substantive due process. *Chicago v. Morales, supra*. The Illinois Supreme Court did not reach questions under the overbreadth doctrine, the Fourth Amendment, or the state constitution.

SUMMARY OF ARGUMENT

The Illinois Supreme Court held the ordinance void for vagueness and a violation of substantive due process. This Court should affirm those holdings.

The indeterminacy of the ordinance confers lawless discretion on the Chicago police. Gang membership in Chicago is, by any measure, distressingly common, so that even if the police targeted only *bona fide* gang members,

they would have a sweeping license to hector groups of young people. The police, moreover, can perceive gang membership when none exists. The police decide when citizens have "no apparent purpose," so that purposes apparent to the citizen need not be apparent to the police. The police decide when submission to their commands does not follow "promptly," and the police decide what it means to "disperse" and to "remove . . . from the area."

Citizens cannot know when they are liable under the ordinance. They do not know whether their companions are in fact gang members, let alone apparent gang members. They do not know when they have "no apparent purpose" while standing on public ground. They do not know how far they must disperse before they "remove themselves from the area." The statutory requirement of a police warning does nothing to cure the failure to give fair warning, because the citizen has the right to know, not when he or she might be arrested, but when he or she might be convicted.

The Illinois Supreme Court determined that the ordinance is an arbitrary violation of the liberty protected by the Fourteenth Amendment, and thus forbidden by substantive due process. The liberty to move about in public, free from physical restraint, lies at the heart of the traditional understanding of due process. That freedom is subject to abridgement only when public policy is narrowly tailored to serve a compelling state interest. Here, citizens who comply with police orders are not incarcerated, but are nonetheless deprived of the fundamental right to stay or to go at will, free from coercive restraint.

If this Court should reverse the Illinois Supreme Court on both vagueness and substantive due process grounds, the judgment below should be affirmed on the basis of the Illinois Appellate Court's holding on Fourth Amendment grounds. A law authorizing the police to detain and question individuals for "loitering" with a gang member would violate the Fourth Amendment as construed in *Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny. Here the statute authorizes custodial arrest and subsequent punishment for conduct that does not even meet the *Terry* reasonable suspicion standard. A substantive criminal law that serves interests independent of authorizing police investigation of other, incipient offenses quite validly expands police authority to stop, question, and arrest. This ordinance, by contrast, furthers no public interest other than expanding police authority to prevent or investigate other crimes.

ARGUMENT

I. THE ORDINANCE IS VOID FOR VAGUENESS

"As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citations omitted). Although these two inquiries are related, the Court has placed less emphasis on fair notice, and more on setting limits on police discretion. *See id.*; *Smith v. Goguen*, 415 U.S. 566, 574 (1974). Accordingly, we begin with considering the ordinance from the

standpoint of the police.

An officer applying the ordinance must make three determinations: that a group includes a gang member; that the members are loitering; and, that they have failed to comply with a dispersal order. The first determination depends on two subsidiary questions. The first is associational: does this citizen belong to a particular organization? The second is classificatory: does that organization qualify as a "criminal street gang" under the ordinance?

At the associational level the officer's discretion is extensive. "The Chicago police department estimates that there are 130 street gangs with membership estimated to be 125,000 strong." **Gang and Narcotic Related Violent Crime**, *supra*, at i. *Bona fide* gang members may not advertise their affiliation by wearing colors. Moreover, some persons, although not gang members, wish to be perceived as such. Once *bona fide* members may have withdrawn from gang activities but still be reasonably believed to be current members. Given the number of genuine gang members, the difficulty of establishing actual membership, and the "wannabe" phenomenon, it will be a rare group of urban youths that does not include at least one person whom the police may "reasonably believe" to be a gang member.

Few police officers will advert to the classification problem, but the difficulty of applying the definition of "criminal street gang" exposes the scope of police discretion under the ordinance. While the definition does indeed cover street gangs like the Gangster Disciples, it also covers a

host of other organizations, leaving it to the police to define the scope of liability under the ordinance. Any group that includes any members who have cooperated to commit two of the enumerated crimes, after the adoption of the ordinance and within five years of the "loitering," qualifies as a criminal gang under § 8-4-015(c)(2)-(4).

Two brothers who sell marijuana to their friends constitute a "criminal street gang," because § 8-4-015(c)(3) includes delivery of cannabis as an enumerated crime. Section 8-4-015(c)(3) also includes bribery, so that had the ordinance been in effect throughout the 1990's, the Chicago Board of Alderman would constitute a "criminal street gang" -- although this possibility generated only laughter when raised before the Board in debate. *See* Tom McNamee, *Here Comes the Bribe*, Chi. Sun-Times Jan. 14, 1996, 18, 1996 WL 6727207. How many labor unions qualify as "criminal street gangs" under the ordinance, given that the same section enumerates the offenses of bribery, intimidation, and compelling organization membership? The members of such organizations are free to have "no apparent purpose" in public, but not because of the terms of the statute. They enjoy this freedom only at the sufferance of the police.

The officer next must determine whether members of the group are loitering, defined as having no apparent purpose. Apparent to whom? Young people may find ample purpose in talk of sports, sex, or popular music, although that purpose be quite obscure to an observer from a different generation or *milieu*. They may find quite urgent purpose simply in being away from the undesired company of parents or intimate partners, or more simply yet in the

physical proximity of peers who share their life and its challenges. Are these purposes "apparent" within the meaning of the ordinance? With respect to the decision to warn and then arrest, only the police can answer that question.

The ordinance leaves the police with lawless discretion to determine when citizens have complied with an order to disperse. They must do so "promptly," which means that no matter how fast the citizens disperse, the officer may find them dilatory enough to be arrested. They must "remove themselves from the area," which means that no matter how far they go, the officer may find them close enough to be arrested. They must "disperse," but so long as city streets run in only two directions, the officer may find them still in groups and so subject to arrest.

This Court has struck down much clearer laws. In *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the Court struck down an ordinance providing, *inter alia*, that "persons wandering or strolling around from place to place without any lawful purpose or object" were vagrants subject to arrest and prosecution. "A presumption that people who might walk or loaf or loiter or stroll . . . is too precarious for a rule of law." *Id.* at 171. In *Kolendar v. Lawson, supra*, the Court struck down an ordinance that, as construed by the state courts, required persons validly stopped under *Terry v. Ohio, supra*, to provide "credible and reliable" identification. "It is clear that the full discretion accorded to the police to determine whether the suspect has provided a 'credible and reliable' identification necessarily 'entrust[s] lawmaking 'to the moment-to-moment judgment of the policeman on his beat." 461 U.S.

at 360 (citations omitted).

The portion of the Jacksonville ordinance that prohibited "wandering or strolling . . . without any lawful purpose" was not conjoined with other problematic inquiries into group membership or adequacy of compliance with a police order. The "credible and reliable" identification requirement in *Lawson* was predicated on a valid *Terry* stop, with no other levels of police discretion. In this case, the police have both *Papachristou*-type discretion to determine when a group is "loitering," *plus Lawson*-type discretion to evaluate a citizen's response to a police demand, *plus* an anterior level of discretion to decide whether a group includes an apparent gang member.

The ordinance also fails to give fair notice to citizens of what conduct is criminal. The citizen faces the same association and classification problems as a police officer. But the citizen also faces additional uncertainties. A citizen cannot know when a group includes a person reasonably believed by the police to be a gang member. One might suppose that at least a *bona fide* gang member would know when he is violating the ordinance, but such is not the case. The ordinance does not prohibit loitering in a group that includes a gang member; it prohibits loitering in a group that includes a person whom the police reasonably believe to be a gang member. Thus even if Citizen A knows that Citizen B, with whom he shares a street corner, is a gang member, Citizen A cannot know whether Citizen B can reasonably be believed to be a gang member.

Nor can a citizen know when the members of a group have "no apparent purpose," or when she has

"removed [herself] from the area" "promptly" enough to avoid liability. In *Palmer v. Euclid*, 402 U.S. 544 (1971), the Court reversed a conviction on fair-notice grounds under an ordinance forbidding wandering at night "without any visible or lawful business," even as applied to a suspect who gave three different addresses and who claimed to have dropped off a friend whose name he did not know.

The cases relied on by petitioner and opposing *amici* are inapposite. The statute upheld in *Colten v. Kentucky*, 407 U.S. 104 (1972), required congregation and refusal to disperse "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof[.]" 407 U.S. at 108. The statute was not tested on its face, but as applied, the Court easily concluding that "[a]ny person who stands in a group of persons along a highway where the police are investigating a traffic violation and seeks to engage the attention of an officer issuing a summons should understand that he can be *convicted* . . if he fails to obey an order to move on." *Id.* at 110 (emphasis added). This Court has recognized that a *scienter* requirement helps to sustain a statute against void-for-vagueness attack. *See Posters 'N' Things v. United States*, 511 U.S. 513, 526 (1994). Colten knew his intentions better than anyone; if he acted with the intent to cause public inconvenience, as the trial court found, he indeed would have known that he could be convicted as well as arrested. Moreover, the Kentucky police -- who asked Colten to leave nine or ten times (*see Colten v. Commonwealth*, 467 S.W.2d 374, 376 (Ky. 1971)) -- knew that they could not arrest anyone simply for refusing to move along, but could arrest only those whose conduct manifested an intent to cause public inconvenience.

The *scienter* requirement in the Kentucky disorderly-conduct statute implicitly required proof of conduct calculated to cause public inconvenience or alarm. Absent a confession, the state could prove *scienter* at trial in no other way. Thus, the statute upheld in *Colten:* (1) did not involve any guesswork about the associations of group members; (2) did not involve any guesswork as to when citizens have no lawful purpose; (3) did not involve any consideration of the adequacy of citizen compliance with a dispersal order, as Colten never attempted to leave; and (4) did require proof of *scienter* with respect to causing observable harm to the public. The Court tested the statute as applied, so that nothing in *Colten* suggests that application of the statute to conduct calculated to cause mere "annoyance" would have survived constitutional challenge. *Cf. Coates v. Cincinnati*, 402 U.S. 611 (1971). Finally, nothing in the Court's opinion -- an opinion primarily addressing the then-urgent question of vindictive sentencing in trial *de novo* criminal court systems -- suggests that the police order to move along played any role in insulating the statute from challenge.

Boos v. Barry, 485 U.S. 312 (1988), does not help petitioner. As construed by the Court of Appeals and this Court, the statute challenged there forbids congregation and refusal to disperse within 500 feet of a foreign embassy when "normal embassy activities have been or are about to be disrupted." 485 U.S. at 332. So construed, the statute is specific as to area and as to the forbidden effect. *Grayned v. Rockford*, 408 U.S. 104 (1972), is distinguishable on the same grounds.

Yet more specific were the drug-paraphernalia laws

upheld in *Posters 'N' Things*, *supra*, and *Hoffman Estates v. Flipside*, 455 U.S. 489 (1982). *Posters 'N' Things* upheld a statute that specifically enumerated certain items, such as "bongs, roach clips, and pipes designed for use with illegal drugs," 511 U.S. at 526, as drug paraphernalia *per se*. *Flipside* upheld an ordinance requiring a license to sell anything "designed or marketed for use with illegal cannabis or drugs," phrases the Court found, respectively, to be "sufficiently clear" and "transparently clear." 455 U.S. at 501-502.

The suggestion that the warning the police must give before arresting under the ordinance cures the vagueness of the statute misses the point of the void-for-vagueness doctrine. The police warning obviously cannot cure the lawless discretion of the police, who decide when the warning is issued and can easily find inadequate compliance with a dispersal order when they desire. *See Shuttlesworth v. Birmingham*, 382 U.S. 87, 90 (1965). Nor can the dispersal order cure the fair notice problem.

The citizen has a right to fair notice *from the legislature* as to what conduct will expose the citizen to *conviction*. In rare cases, notice can be supplied by the courts, either in the definition of common-law crimes or in the interpretation of an otherwise vague statute. But the fair notice idea leaves no room for intermediate law-making by the police.

The law allows the police to arrest innocent people so long as there is probable cause, and practically speaking a citizen must submit to an illegal arrest, however arbitrary. A citizen, however, has the right to know when conduct for

which he may be arrested is nonetheless lawful. Put another way, a citizen has the right to know when a police threat of arrest exceeds legislative authority, so that the citizen can acquiescence in arrest confident of making a defense in court and so establishing his right to engage in the conduct for which he was arrested. *See Bouie v. City of Columbia*, 378 U.S. 347, 355 n.5 (1964) (reversing conviction on ground that application of state statute to defendant's conduct was unforeseeable: "We think it irrelevant that petitioners at one point testified that they had intended to be arrested."). In *Colten* and *Boos* the statutes predicated arrest on defiance of a police order; in *Grayned* the defendants were in fact warned by the police before being arrested. Yet the Court placed no emphasis on the police warnings in these cases.

As applied to this case, the citizens of Chicago have a right to know when they are, and are not, in violation of the ordinance. If they know that they are not in violation, they are within their rights -- and indeed within a proud American tradition of defying excesses of authority -- to reply to the officer: "No, sir. We are not going to disperse. Arrest us if you will, and we will see you in court." This they cannot do under the ordinance, for they cannot know with any confidence when they are "loitering" with anyone "reasonably believed to be a gang member."

This analysis also applies to the possibility that the Chicago Police Department's general order cures the vagueness of the ordinance. So long as citizens cannot defeat a charge under the ordinance by raising a violation of the order as a defense, the citizen is deprived of fair notice because he is vulnerable to an individual officer's decision

to violate the order. The Illinois Supreme Court concluded that respondent Morales was convicted despite just such a violation of the order, *see* 687 N.E.2d 64 n.1, and the state Court of Appeals pointed out that "the Chicago police department is not a judicial agency and has no power to make a judicial determination of the meaning of an ordinance." 660 N.E.2d at 41.

The federal courts have no authority to read the general order into the ordinance, or to otherwise narrow the scope of the ordinance by interpretation. Federal courts may save a borderline *federal* statute from vagueness challenge through limiting interpretation, but the meaning of a local ordinance is the province of the state courts. *See Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972); *Grayned, supra*, 408 U.S. at 110. As the Illinois Court of Appeals concluded, "it would be impossible to save the Chicago ordinance by judicial construction." 660 N.E.2d at 41.

While it is certainly preferable for high-ranking police officers to exercise discretion through the rule-making process, this process does not eliminate police discretion but at best transfers it from the street to headquarters. The executive branch of the government is still making the law.

The cases cited by the United States are not to the contrary. Federal courts are well within their rights to construe federal statutes, *e.g., Boos, supra*, or to defer to agency interpretations, *e.g., Ehlert v. United States*, 402 U.S. 99, 107 (1971) (following agency practice in deciding federal statutory question). *Cf. Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Properly

cabined by legislative guidance, Congress may delegate to the executive power to promulgate regulations whose violation can be punished as a crime. *Touby v. United States*, 500 U.S. 160 (1991). Here, however, the state courts expressly found that there was no delegation of the power to promulgate enforceable limits on the meaning of the ordinance.

Hoffman Estates v. Flipside, supra, did place some emphasis on guidelines issued by the prosecutor interpreting a drug paraphernalia ordinance. In that case, however, the village code provided that any interested person could petition the appropriate department of the village government for a rule clarifying his legal obligations. *See Flipside v. Hoffman Estates*, 639 F.2d 373, 385 n.30 (7th Cir. 1981), *rev'd*, 455 U.S. 489 (1982). As this Court noted in *Flipside*, "instead of applying for a license or seeking clarification via the administrative procedures that the village had established for its licensing ordinances, Flipside filed this lawsuit . . . ." 455 U.S. at 493 (footnote omitted). In effect, Flipside had waived the opportunity to have the prosecutor's guidelines given the force and effect of law through the rulemaking process. Thus it is easy to see why throughout the litigation, in the words of the Seventh Circuit in *Flipside*, "the license guidelines . . . became an integral part of the ordinance." 639 F.2d at 378.

Moreover, *Flipside* involved a licensing scheme, not a criminal prohibition. Business people subject to economic regulatory schemes are held to a higher standard of understanding their obligations. *See, e.g., McGowan v. Maryland*, 366 U.S. 420, 428 (1961) (vagueness analysis more generous in regulatory context); *United States v.*

Dotterweich, 320 U.S. 277 (1943) (upholding strict liability conviction under regulatory statute). Guidance from the enforcement authorities may help to defeat a vagueness challenge to a regulatory statute. The *Flipside* Court emphasized this point. *See* 455 U.S. at 498 & n.12 (citing *McGowan, supra*).

If the Court reads *Flipside* as expressing the view that informal, unenforceable law enforcement policies can substitute for legislative definition of criminal offenses, we respectfully submit that any such expressions -- which were not necessary to the result in *Flipside*[2] -- should be disavowed. Affirming such a view would imply that absent the police department's general order, the ordinance would be unconstitutional. This in turn would entitle defendants to plead violations of the general order as a defense, a result expressly rejected by the state courts, whose ruling is immune to second-guessing in federal courts under *Wilson* and *Grayned*.

II. THE ORDINANCE UNJUSTIFIABLY DEPRIVES INDIVIDUALS OF PHYSICAL LIBERTY, IN VIOLATION OF THE FOURTEENTH AMENDMENT

The court below held that the ordinance violates substantive due process, and did not reach the Fourth Amendment theory endorsed by the state Court of Appeals. Whether or not the ordinance's limit on personal mobility

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2. *See* 455 U.S. at 501 (noting *both* that guidelines clarified "designed for use," *and* that standard dictionaries indicate that business people could understand this phrase).

amounts to a Fourth Amendment "seizure,"[3] it follows that the rule of *Graham v. Connor*, 490 U.S. 386 (1989), has no bearing on this case. While this Court might reach the Fourth Amendment issue to affirm the Illinois Supreme Court, *see, e.g., Schenck v. Pro-Choice Network of Western New York*, 117 S. Ct. 855, 870 n.12 (1997), it should do so only if it first rejects the substantive due process theory relied on by that court.

Both the Illinois courts and the petitioner, however, have mischaracterized the due process issue. The ordinance is no garden-variety exercise of the police power, subject to rational-basis scrutiny in a post-*Lochner* world. Rather, the ordinance abridges physical liberty by coercively restricting the public space available to perceived gang members and their friends. Known gang members may not publicly associate with anyone in public, including indoors at commercial establishments open to the public. While other citizens may go about in public, they must avoid the company of friends who might be gang members.

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). For Blackstone, liberty under Magna Charta's Chapter 39 meant "the power of locomotion, of changing situation, or moving one's person

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3. In our view, due process analysis, rather than Fourth Amendment analysis, ought to apply when the state restricts personal mobility by making certain areas off-limits, as distinct from taking persons into custody, however briefly. *See Sacramento v. Lewis*, 118 S. Ct. 1708, 1715 (1998).

to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." William Blackstone, 1 **Comm.** *134. Chancellor Kent read due process as protecting "personal liberty," with habeas corpus supplying a remedy for "all unlawful restraint or imprisonment." James Kent, 2 **Comm.** *26. While the Fourteenth Amendment was pending before the states, Judge Cooley wrote that Blackstone's definition of liberty "implies that certain qualifications . . . rest upon this power, which are known to the law and enforced by it. without infringing upon constitutional liberty." Thomas Cooley, **Constitutional Limitations** 339 (1st ed. 1868). The state, Cooley wrote, could restrict personal liberty to punish and prevent crime; to punish and deter contempts; to conscript for military service; and to protect society from those who "by reason of mental infirmity, are incapable of self-control." *Id.* This list was exhaustive. After discussing the private, as opposed to public, restrictions on liberty known to the law, Cooley concluded that "[f]or any other restraint, or any abuse of the legal rights which have been specified, the party restrained is entitled to immediate process from the courts, and to speedy relief." *Id.* at 342.

The early writers treated personal liberty in discussing habeas corpus, the traditional remedy for violations of Magna Charta or of American due process or law-of-the-land clauses. But they were adamant that incarceration was not the only way in which liberty could be restrained. "The confinement of the person, in any wise, is an imprisonment; so that the keeping of a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment." Blackstone, *supra*, at *136. "Every restraint upon a man's

liberty is, in the eyes of the law, an imprisonment, wherever may be the place or whatever may be the manner in which the restraint is effect." Kent, *supra*, at *26.

The ordinance leaves gang members and their friends far more liberty than they would enjoy in jail. Yet the difference is one of degree, not of kind. A curfew applicable only to apparent gang members and their companions would work a clear deprivation of liberty. *See Hirabayashi v. United States*, 320 U.S. 81, 99 (1943). A law that prohibited apparent gang members from attending the movies would likewise work a clear restraint, even though those restrained had perfect freedom to go anywhere else. House arrest, electronic or personal monitoring, banishment from certain places or establishments -- these are familiar features of probation imposed as punishment for crime. To impose such restrictions on persons solely on account of perceived gang membership amounts to physical restraint, not an ordinary exercise of the police power.

The suggestion that the ordinance does not abridge this freedom, on the theory that apparent gang members and their friends retain the right to perpetual motion, smacks more of Kafka than of our Constitution. The right to come and go at will includes the right not to go at the behest of the police. In any event, those told to move on by police applying the ordinance know that they are not free to go to any public place in the city.

Little less bizarre is the suggestion that the ordinance allows gang members to go where they wish so long as they go alone. Solitude is not easily achieved in the public spaces of major cities, so that the ordinance

necessarily bars apparent gang members from any location shared by other human beings -- a major restraint on the freedom to come and go. Moreover, to be allowed access to public places only on the condition of abandoning one's friends puts a heavy burden on the exercise of the right of locomotion. *Dallas v. Stanglin*, 490 U.S. 19 (1989), stands for the proposition that juveniles have no constitutional right to meet older strangers on business premises, not for the proposition that the state can condition use of the streets on solitude. *Coates v. Cincinnati*, *supra*, 403 U.S. at 615-16, squarely holds that a vague statute's constitutional infirmity is aggravated, rather than mitigated, when it applies to groups rather than to individuals.

Laws restricting personal liberty to come and go at will are not subject to rational-basis review, but rather must be narrowly-tailored to serve a compelling state interest. *See, e.g. Reno v. Flores*, 507 U.S. 292, 301-302 (1992); *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992). In applying this test, the Court would recognize no new fundamental right. Instead, the Court simply would recognize that laws making public ground off-limits to persons designated by the police restrain the physical freedom to come and go that lies at the heart of the "liberty" protected by the due process clause. *See Williams v. Fears*, 179 U.S. 270, 274 (1900) ("Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment . . . ."); John Paul Stevens, *The Third Branch of Liberty*, 41 **U. Miami L. Rev.** 277, 287-88 (1986).

Vagrancy laws are also part of our legal tradition. Historically, vagrancy laws have performed two quite distinct functions. One function has been to protect the perfectly legitimate state interest in preventing crime. The other role played by vagrancy law has been the illegitimate, even odious, function of cowing members of disfavored groups, whether they be medieval serfs, freed slaves subject to Reconstruction-era Black Codes, progressive-era labor activists, or, more recently, homosexuals and urban blacks. *See* William Quigley, *Five Hundred Years of English Poor Laws, 1349-1834*, 73 **Akron L. Rev.** 73, 89-91 (1996) (medieval vagrancy laws exploited serfs by suppressing competition for labor); Eric Foner, **Reconstruction** 198-210 (1988) (discussing Black Codes, in which vagrancy laws played a prominent role); James Gray Pope, *Labor's Constitution of Freedom*, 106 **Yale L.J.** 941, 1009 (1997) (example of vagrancy law used against strikers); Shanon Minter, Note, *Sodomy and Public Morality Offenses under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 **Cornell L. Rev.** 771, 804 (1993) (vagrancy laws "used in a variety of instances to harass homosexuals.") (footnote omitted); William Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 **Mich. L. Rev.** 1016, 1077 (1995) ("Racism combined with broad police discretion was, after all, what prompted courts to invalidate vagrancy and loitering laws in the first place.")

No legal tradition should be expected to be free from occasional contradictions. When elements in the tradition conflict, the Court must choose among them. *Terry v. Ohio* incorporated into Fourth Amendment law all of the legitimate interests served by traditional vagrancy law. *Papachristou* repudiated the oppressive aspect of the

vagrancy laws. If *Papachristou* is thought insufficiently clear on the point, we submit that the tradition of personal liberty, recognized in the earliest sources of due process, deserves priority over the tradition of repression and discrimination embodied in traditional vagrancy law. The place of the Alien and Sedition Acts in First Amendment jurisprudence offers a suggestive analogy.

In any event, the ordinance is not a traditional vagrancy ordinance. Loitering laws, as distinct from vagrancy, are of relatively recent vintage. The oldest case we have found using the term "loitering" is In re *May*, 1 N.W. 1021 (1879), a post-Fourteenth Amendment decision, which emphasized that vagrancy "can only reach such cases of vagabondage as come fairly within the common law meaning of the word, which was possibly designed to protect the public from expense, quite as much as from disorder." 1 N.W.2d at 1022. The *May* court had something else to say pertinent to this case: "Making, as we are disposed to make, all proper allowance for the zeal of police officers in dealing with persons who are supposed to be bad members of society, it is the duty of all courts to prevent good or bad citizens from being unlawfully molested." *Id.* at 1023.

If loitering laws are relatively recent variations on vagrancy, the ordinance is an entirely novel variation on loitering law. *Papachristou* threw out loitering defined solely as having no lawful business while in public. Modern loitering laws typically require no lawful business *plus* some additional act, mental state, or consequence. *See, e.g.*, American Law Institute, **Model Penal Code** § 250.6 (1962) (prohibiting loitering "under circumstances that warrant

alarm for the safety of persons or property in the vicinity."). The ordinance, by contrast, criminalizes loitering plus suspected membership in an organization, when actual membership in that organization is not itself a crime. That may be good policy; it probably violates the First Amendment; but it is certainly not traditional.

The "shock the conscience" test adopted for unintentional official homicides in *Sacramento v. Lewis*, 118 S. Ct. 1708 (1998), is inappropriate here. The *Lewis* plaintiffs sought recognition of a new, unenumerated right. Respondents here assert their right to come and go without police permission, the central meaning of constitutional "liberty" since the dawn of the Republic. The "shock the conscience" test is obviously vague, and it gives insufficient protection to personal liberty. This Court has never struck down state action under the test. *Rochin v. California*, 342 U.S. 165 (1952), whence the test derives, involved a warrantless midnight entry without probable cause, followed by the notorious stomach-pumping. This conduct was unconstitutional under the Fourth Amendment and *Wolf v. Colorado*, 338 U.S. 25 (1949), quite aside from any conscience-shocking. Conscience-shocking was the benchmark for when a federal exclusionary remedy was to supplement state tort remedies for Fourth Amendment violations.[4] The conversion of this remedial analysis into a highly open-textured test of substantive rights may be too late to reverse, but it should not be expanded -- least of all

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4. For a fuller treatment, see Donald Dripps, *At the Borders of the Fourth Amendment: Why a Real Due Process Test Should Replace the Outrageous Government Conduct Defense*, 1993 **Ill. L. Rev.** 261, 265-72.

to test restraints on the basic liberty of physical freedom. The *Rochin* test has not governed this Court's recent cases involving physical restraints. *See Foucha, supra; Flores, supra; Kansas v. Hendricks*, 117 S. Ct. 2072 (1997); *United States v. Salerno*, 481 U.S. 739 (1987); *Schall v. Martin*, 467 U.S. 253 (1984).

Tested under the appropriate standard, the ordinance fails. While the prevention of violent crime may be a compelling state interest, *see Salerno, supra*, 481 U.S. at 749, this Court has accepted crime-control as a justification for physical restraint only when those restrained have given some specific and powerful indicia of dangerousness. Those restrained must have behaved so as to suggest *imminent* danger, as in *Terry v. Ohio, supra*, or to have committed prior crimes under circumstances highly probative of recidivism, as in *Hendricks* and *Salerno*. The ordinance, by contrast, requires no specific conduct manifesting criminal propensity other than public association with an apparent gang member.

The state has not made gang membership, as such, a crime. *See Youkhana*, 660 N.E.2d at 42. The state probably could not do so under the demanding test of *Scales v. United States*, 367 U.S. 203 (1967). To the extent an inference of imminent crime may fairly be drawn from apparent gang membership and other circumstances, *Terry* allows the police to take forcible steps to prevent the incipient offense. The Chicago police certainly may take apparent gang affiliation into account in assessing probable cause or reasonable suspicion under *Terry*. *See* In re *M.N.*, 645 N.E.2d 494, 502 (Ill. App. 1994); *People v. Bobe*, 592 N.E.2d 301, 308 (Ill. App. 1992).

Sibron v. New York, 392 U.S. 40 (1968), however, squarely holds that prolonged, apparently idle, association with known criminals does not by itself give rise to the reasonable suspicion demanded by *Terry*. The *raison d'etre* of the ordinance is to authorize coercive police intervention otherwise forbidden under the Fourth Amendment, *i.e.*, to draw an inference of imminent crime from mere suspicion of gang involvement. While a move-on order may not constitute a Fourth Amendment "seizure," it certainly amounts to a deprivation of "liberty" under the Due Process Clause. This Court's decisions, and our constitutional tradition, require testing such limitations on physical freedom under the strict-scrutiny standard.

The ordinance authorizes the exclusion of gang members and their friends from public space without regard to prior crimes or present indicia of danger. It is not limited to juveniles, as were the restraints in *Flores* and *Schall*. It applies to competent adults, not just those who have, as in *Hendricks*, lost the power of self-control on account of mental aberration. It applies at all hours of the day, to all public places in the city. Those who comply with move-along orders enjoy no procedural safeguards whatsoever against erroneous or malicious enforcement. The city chose not to incorporate even the minimal standards contained in the police department's general order into the ordinance itself. Indeed, given the previous vagueness analysis, the ordinance is not narrowly tailored in any sense. Finally, a host of strategies -- vigorous exercise of the stop-and-frisk power allowed under *Terry*, community policing, more secure communications, and adding police manpower, to name a few -- offers less intrusive alternative approaches to controlling gang-related crime.

III. The Ordinance Violates the Fourth Amendment

There can be no doubt that persons arrested under the ordinance are "seized" within the meaning of the Fourth Amendment. Arrest carries with it the power to search. *Robinson v. United States*, 414 U.S. 218 (1973). Thus the ordinance authorizes the arrest and search of persons who, absent the ordinance, could not even be detained or frisked, under *Sibron*, *supra*. If the statute were cast as an authorization of police investigation, rather than as a substantive offense -- *i.e.*, if it provided that "loitering with suspected gang members provides probable cause to believe the suspects are about to commit a crime" -- it would be plainly unconstitutional. *See, e.g., Payton v. New York*, 445 U.S. 573 (1980) (striking down New York statutes authorizing warrantless home entries to arrest).

Of course every substantive offense expands police authority to stop, search, and arrest. But denominating broader police powers substantive crimes should not insulate state laws from Fourth Amendment challenge. A statute making it a crime to refuse to step outside when summoned by the police would fare no better than the statutes struck down in *Payton*. A law making it a crime to arouse the suspicions of the police, or to refuse consent to search, could not survive Fourth Amendment scrutiny.

The difference between a substantive offense forbidding disorderly conduct, or marijuana possession, or gun possession, and a "substantive" offense of causing the police to become suspicious, is that the valid substantive offenses of the former type protect some social interest that

is independent of expanding police investigative powers. Disorderly conduct causes a risk of violence; marijuana possession threatens public health and morals; gun possession is one indicia of other potential crimes, but gun regulations also prevent accidents and prevent weapons from falling into the hands of other persons who might use them criminally. Occasionally, a substantive offense, such as possession of burglar's tools, will simply specify liability for attempt. Here as elsewhere legislatures deserve great deference in fashioning the substantive criminal law, but a line must be drawn somewhere or probable cause and reasonable suspicion will mean nothing.

The place to draw that line is here, because the ordinance protects no constitutionally cognizable interest other than crime prevention, and it ostensibly prevents crime solely by circumventing the Fourth Amendment. To the extent the ordinance serves the interest of preventing or exposing crime by gang members and their associates, it does so only by expanding police arrest and search powers in defiance of the *Terry* standard. The only other interests the ordinance might serve are to protect groups including gang members from criminal violence by other private persons, and to alleviate the fear apparent gang members cause other citizens.

To the extent that citizen fears of gang-related crime are objectively reasonable, the police have power under *Terry* to investigate forcibly. To the extent that citizen fears arise without objectively reasonable grounds to suspect the commission of other crimes, *Coates v. Cincinnati*, *supra*, forecloses any justification of the ordinance on that ground. "Our decisions establish that mere public intolerance or

animosity cannot be the basis for abridgment of these constitutional freedoms [of free assembly and association]." 402 U.S. at 615 (citations omitted). *Coates* likewise excludes the possibility that the ordinance might be justified to protect loiterers from shooting by hostile gangs.

Many citizens quite sincerely, however irrationally, feel fear and loathing in the presence of blacks, homosexuals, or immigrants. At times this hostility can make it likely that an undesirable citizen who steps into hostile territory may become a victim of criminal violence. The logical result of basing laws on community prejudices or blood feuds would be a legally enforced homogeneity, a world in which each must keep to his own. There is no cognizable social interest in catering to bigotry or thuggery. Petitioner may not overcome a Fourth Amendment challenge by invoking interests this Court has held to violate the freedoms of speech and association.

CONCLUSION

The ordinance may have been a useful response to the undeniable problem of gang-related crime. We are skeptical on that point. Homicide numbers change for all sorts of reasons (the economy, age demographics, emergency medical services, drug-use and marketing patterns, even the weather), and on a base rate of several hundred, a small number of incidents looks like a large percentage. If police resources were shifted away from enforcing the ordinance to other uses, any cost to gang enforcement must be balanced against the benefits of resources reallocated to other law-enforcement priorities.

Petitioner points to no controlled study supporting the claim that the ordinance contributed to a decline in gang-related homicides. Even the crude numbers in the city's report, **Gang and Narcotic Related Violent Crime,** *supra*, do not support the inference that the ordinance caused a drop in gang-related crime. In 1994, the first year of vigorous enforcement, gang-related homicides and drive-by shootings actually went up. *Id.* at 2, 7. While homicides classified by police as gang-related dropped in 1995, when the ordinance was in force, there were fewer gang-homicides in 1997 than in 1995. *Id.* at 3, 5. Homicide, overall, has continued to decline. *Id.* at 3-5 (homicides totaled 828 in 1994, 793 in 1996, and 759 in 1997).

As for the claim that the ordinance enabled a less coercive approach to law enforcement, we gently suggest that no law used to arrest three hundred people a week represents a triumph for liberty. Age of first arrest, moreover, is a major predictor of career criminality, *see, e.g.*, Elizabeth Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 **J. Crim. L & Crimin.** 137, 154 n.12 (1997). No doubt some of those first arrested under the ordinance are destined for a life of crime no matter what; but some, especially those arrested for the "crime" of being with a gang member, might well lead law-abiding lives if they can avoid needless induction into the cycle of arrest and recidivism. Needless, hostile encounters with police may label young men as gangsters and foster disrespect for the law. *See* Kathryn Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 **Ind. L. J. 593,** 607-608 (1996).

Whatever the merits of these arguments, this Court

should not uphold the ordinance simply because it appears to be useful. Policy considerations of course have a place in adjudication, even in constitutional adjudication. But policy considerations enter adjudication mediated through legal doctrine, which often rejects apparently urgent social interests in favor of deeper and more permanent values. This Court is not only "the forum of principle." We believe it should also be the forum of long views. *See Korematsu v. United States*, 322 U.S. 214, 245-46 (1944) (Jackson, J., dissenting).

Doctrinally speaking, the ordinance is hopelessly vague, and it unjustifiably abridges both personal liberty and the freedom from unreasonable searches and seizures. These vices compound one another. Vague laws are especially suspect when they trench on other constitutional liberties, and the lawless discretion the ordinance entrusts to the police aggravates the offense to personal liberty. The unanimous court below recognized as much, and its judgment should be affirmed.

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CITY OF CHICAGO,
Petitioner,

v.

JESUS MORALES, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Illinois

BRIEF OF *AMICI CURIAE* NATIONAL BLACK POLICE ASSOCIATION, CHICAGO NBPA, HISPANIC NATIONAL LAW ENFORCEMENT ASSOCIATION, and NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTERESTS OF *AMICI*[1/]

Amici, a unique coalition of a national civil rights legal organization and law enforcement professionals, are brought together by their mutual interest in building strong relationships between the police and the communities they serve, in minimizing the traditionally adversarial and antagonistic interactions between police and community residents, and in eliminating discriminatory enforcement of criminal laws.

The National Black Police Association ("NBPA") is an organization of minority law enforcement professionals. NBPA has more than 34,000 individual members and more than 140 chapters in police departments in 34 states and the District of Columbia. The Chicago chapter of NBPA joins this coalition as an *amicus*. NBPA and its members support the philosophy of community policing that calls for a true, cooperative partnership between the community and the police for safer communities.

The Hispanic National Law Enforcement Association ("HNLEA") is a nationwide organization of Latino American police officers. HNLEA has local chapters in all major cities throughout the United States, as well as three chapters in Puerto Rico. Congress has recognized HNLEA as the only national organization representing Latino officers. Members of HNLEA are dedicated to the promotion of justice, fairness and effectiveness in law enforcement. One of its primary missions is to improve the relationship between minority communities and the police in order to promote the safety of the public and the quality of life in those communities. As part of that mission, HNLEA seeks to eliminate police brutality and racial discrimination in law enforcement.

1/ Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation (established in 1940) organized to assist African Americans in securing their constitutional and civil rights. Its purpose includes rendering legal aid without cost to African Americans suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own. For almost sixty years, its attorneys have represented parties and have participated as *amicus curiae* in this Court and in the lower state and federal courts.

LDF has a long-standing concern with the influence of racial discrimination in the enforcement of loitering ordinances. It has successfully challenged ordinances similar to the one at issue here when they have been arbitrarily employed against civil rights demonstrators; *see, e.g.*, *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965); *Garner v. Lousiana*, 368 U.S. 157 (1961); *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Avent v. North Carolina*, 373 U.S. 375 (1963), and against minority citizens lawfully enjoying public spaces, *Wright v. Georgia*, 373 U.S. 284 (1963); *Thompson v. City of Louisville*, 362 U.S. 199 (1960). LDF's continuing concern over the arbitrary and destructive use of police power led it to represent the respondent in *Tennessee v. Garner*, 471 U.S. 1 (1985).

It is not often that *amici* find ourselves in complete agreement about the lawfulness and wisdom of a criminal ordinance. But we do in this case. The Chicago Gang Loitering Ordinance is a broad, standardless law that invites arbitrary and discriminatory enforcement. The Court has seen laws like this before and has properly struck them down as unconstitutional.

Amici are concerned about the impact of such laws upon effective law enforcement. For much of our history, law enforcement has lacked credibility in minority communities because of racist and arbitrary enforcement of the law. Scholar Leon F. Litwack recalls accurately how many African Americans came to view police earlier this century:

> From the very outset of their lives, young blacks came to learn that in the New South the differences between justice and injustice, the law and lawlessness, were at best ambiguous, at worst senseless, so blurred as to be indistinct. The ways in which they experienced the courts and police power were hardly calculated to enhance their respect for the law or for the white man's sense of fair play. The very relationship black people bore to protective agencies contrasted sharply with that of whites. Even as white children were inculcated with the image of the policeman as a friend and protector, black children learned to fear him as the enemy.

Leon F. Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow* 15 (1998).

And while we have made progress in bridging this divide, it is just as clear that we have much work yet to do. An overwhelming body of evidence confirms that deep mistrust remains between minority communities and the police. In recent years, Minneapolis police chief Robert Olsen characterized relations between his department and minority citizens as "a tinder box,"[1] Nashville police chief Emmett Turner acknowledged strained relations between police and minority citizens,[2] and Portland's police chief, Michael Chitwood, noted that "every time the police interact with the minority community there's a perception that they're being

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[1] Paula Dittrick, *Police Chiefs Discuss Race Relations*, United Press Int'l, Sept. 26, 1996.

[2] Associated Press, *Black Nashvillians Leery of Police Conduct*, Memphis Comm. App., Aug. 28, 1997, at A18.

picked on."[4] In light of those statements, it is not surprising that Attorney General Janet Reno concluded that:

> [a] crucial item on the [Department of Justice's] agenda . . . is an effort to build a greater sense of community and trust between law enforcement and the minority community. There is no other area where the potential for misunderstanding and miscommunication can have such dangerous consequences. . . . So it is an absolute imperative that we establish better trust, cooperation and communication between the community and the police.

Janet Reno, *Civil Rights: A Challenge of Conscience*, 27 Cumb. L. Rev. 381, 393-94 (1996/1997).

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[4] Andrew D. Russell, *Portland Minorities, Police Try to Bridge Deep Cultural Abyss*, Portland Press Herald, Dec. 9, 1996, at 1A.

From coast to coast, other cities have reported similar tensions. Public officials in Albany, New York recently reported that many minority citizens "don't trust the police." Jay Jochnowitz, *Arbor Hill Station Hits Roadblock*, Times Union, Oct. 8, 1996, at B5. Recent shootings of minority citizens in Boise, Charlotte, Little Rock and Lima, Ohio, have strained police-community relations. *See* Editorial, *More Citizen Involvement Helps Keep Boise Streets Safe*, Idaho Statesman, June 19, 1998, at 12a; Knight Chamberlain, *Cooperation Cuts Crime*, Raleigh News & Observer, Jan. 5, 1997, at B1; Matthew Waite, *Kids Learn Cops 'Do More than Shoot,'* Ark. Democrat-Gazette, Aug. 14, 1997, at 1A; David Ogul, *White Police and Black Community a Mix that Works*, Press-Enterprise (Riverside, CA), Oct. 6, 1996, at A05. Dallas police officers conceded that the African American community is repeatedly "bombarded with officers conducting illegal searches, approaching black and Hispanic males and placing them on the ground." Robert Ingrassia, *Police Shooting Was Dallas Turning Point*, Dallas Morning News, Oct. 27, 1996, at 1A. Hartford police chief Edward Brymer noted recently that "[t]here has been resentment toward police officers accused of harassing minorities and using excessive force." Colin Poitras, *Nominee Plans Visibility in Job*, Hartford Courant, Jan. 30, 1998, at B1. Recently, the Omaha Human Relations Board concluded that minorities do not have much trust in the police, and "feel mistreated or harassed by the police because of their race." Randy Tucker & Jena Janovy, *Little Police, Minority Trust Seen Police-Community Relations Problems*, Omaha World-Herald, Sept. 1, 1998, at News-1.

The Chicago ordinance will only exacerbate traditionally strained relations between minority communities and police. While *amici* are well aware of the many problems that gangs can visit upon a community, we cannot endorse this particular tool that will harm both community-police relations and the detection and prevention of crime.

SUMMARY OF ARGUMENT

Chicago's broad Gang Loitering Ordinance (the "ordinance") is unconstitutionally vague under long-established standards of this Court. It fails to define in any meaningful way the conduct that is prohibited. It leaves to an officer's unfettered discretion the decision as to whether to deem conduct an "apparent purpose," or "movement" out of the "area" sufficient to satisfy the ordinance. As in *Kolender v. Lawson*, the ordinance "may permit a standardless sweep that allows policemen, prosecutors and juries to pursue their personal predilections." 461 U.S. 352, 358 (1983). It provides a tool for "harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure." *Id.* at 360. The ordinance is simply another version of the abusive and discriminatory "street sweeps" that have been condemned uniformly by the courts and commentators as unconstitutional and ineffective.

There is nothing about the ordinance, contemporary law enforcement or current circumstances that warrants departure from the well-settled body of law applied by the Illinois Supreme Court in finding the ordinance unconstitutionally vague. Contrary to the assertions of certain *amici* for Chicago, discrimination in law enforcement remains a matter of real and grave concern. Standardless laws such as the ordinance, which leave enforcement to the unguided discretion of the police, exacerbate the risks of discriminatory enforcement. They also heighten the risk of damaging relations between the police and the community resulting from the perception of discriminatory enforcement.

Chicago and certain of its *amici* assert that the potential for abuse of the ordinance need not concern the Court because the ordinance enjoys some community support and is a manifestation of "community policing." Pet. Br. 14-15. They contend that effective community policing requires that the courts "provide greater leeway" for state and local governments to address "signs of chronic disorder on the streets." Pet. Br. 15; *Amicus* Brief of 20 Neighborhood Organizations ("CNO Br."), *passim*. Chicago and its *amici* further assert that Chicago's experience with the enforcement of the ordinance from 1992 to 1995 "validated" its effectiveness. Pet. Br. 16. Each of those propositions is incorrect.

The ordinance is, in fact, the antithesis of community policing and of sound law enforcement practice. Two of the most important pillars of community policing are the strengthening of relationships between police and community residents, and the employment by police of a wide range of alternatives to the traditional law enforcement strategies of arrest and prosecution, saving traditional law enforcement for those cases in which it can do the greatest good. The ordinance is contrary to both principles.

Rather than eschew traditional law enforcement strategies in favor of more innovative, flexible approaches to the community's problems, the ordinance directs the police to arrest and prosecute thousands. The City's statistics show that there were in excess of 41,000 arrests under the ordinance during the three years of its enforcement. Contrary to Chicago's repeated suggestion that the ordinance targets only "visibly lawless" behavior (Pet. Br., *passim*), in fact, the ordinance targets otherwise innocent behavior. The net cast by the ordinance is extremely wide, sweeping into the criminal justice system large numbers of people who are guilty of no crime other than standing, sitting or remaining in one place on the public sidewalks, in public parks, or in other public places, in the vicinity of a suspected gang member and in a manner that piques an officer's antipathy. The ordinance thus significantly multiplies the number of hostile, adversarial interactions between the police and citizens, principally minority citizens. Rather than

strengthening relations, the ordinance widens the gulf between police and community.

Nor does Chicago's experience "validate" the efficacy of the ordinance. The crime statistics for the City of Chicago for the relevant periods do not show that enforcement of the ordinance reduced crime. Since 1992, there has been a nationwide decrease in crime in communities of all types and sizes using all sorts of law enforcement techniques. This decline has been attributed to a variety of factors, none of which is precisely understood. What is clear, though, is that there is no empirical basis for concluding that enforcement of the ordinance had any effect on crime. The drop in the crime rate began before Chicago enforced the ordinance and continued after it ceased enforcement.

While gang crime is unquestionably a serious problem, it is not necessary to suspend constitutional principles to address it. The Chicago Police Department's representative at City Council hearings on the ordinance acknowledged that fact, and the experience of cities, like San Diego and Boston, confirms it. Those cities have achieved substantial reductions in crime without the use of extreme measures like the Gang Loitering Ordinance.

ARGUMENT

I.
THE GANG LOITERING ORDINANCE IS UNCONSTITUTIONALLY VAGUE

A consistent theme throughout the briefs of Chicago and its *amici* is their concern about gang-related crime and the detrimental effect criminal gang activity has on the surrounding community. These *amici*, as law enforcement professionals and members of communities that are disproportionately affected by gang crime, share those concerns. Unfortunately, those concerns are not new, and neither is Chicago's approach to them. The desire to prevent and combat crime has been the articulated rationale for other loitering and vagrancy laws previously considered by the Court,

including the statute at issue in *Kolender*. But, as the Court admonished in that case, the desire to combat crime cannot suspend constitutional protections against vague laws. As Justice O'Connor noted:

> Appellants stress the need for strengthened law enforcement tools to combat the epidemic of crime that plagues our Nation. The concern of our citizens with curbing criminal activity is certainly a matter requiring the attention of all branches of government. As weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity.

Kolender, 461 U.S. at 361.

This Court's emphasis on definiteness and clarity stems from long experience with abusive and discriminatory enforcement that too frequently accompanies standardless or imprecise laws:

> "These [vagrancy] statutes are in a class by themselves, in view of the familiar abuses to which they are put . . . . Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution although not chargeable with any particular offense. In short, these 'vagrancy statutes' and laws against 'gangs' are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided."

Papachristou v. City of Jacksonville, 405 U.S. 156, 166 (1972)(*quoting Winters v. New York*, 333 U.S. 507, 540 (1948) (Frankfurter, J., dissenting)).

This Court has long made clear that an ordinance fails to meet constitutional standards of "definiteness and clarity" not only where the ordinance fails to provide adequate notice so that "ordinary people can understand what conduct is prohibited," but

more importantly, where the legislature has failed to "'establish minimal guidelines to govern law enforcement.'" *Kolender*, 461 U.S. at 357-58 (*quoting Smith v. Goguen*, 415 U.S. 566, 574 (1984)). "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Id.* at 358 (*quoting Smith*, 415 U.S. at 575). Chicago's ordinance does not meet that standard.

A. The Ordinance Impermissibly Leaves Enforcement To The Unconstrained Predilections Of The Police.

The "more important aspect of the vagueness doctrine, 'is . . . that a legislature establish minimum guidelines to govern law enforcement.'" *Kolender*, 461 U.S. at 358 (*quoting Smith*, 415 U.S. at 574). Chicago contends that the ordinance satisfies this important requirement because it applies only to persons who (i) do not have an apparent purpose, (ii) are loitering with a person reasonably believed to be a gang member, and (iii) fail to move on when ordered to do so. Pet. Br. 34-35. Contrary to Chicago's assertion, however, the ordinance, "by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute," *Id.* at 361, encourages arbitrary and discriminatory enforcement in precisely the manner as did the laws this Court held unconstitutional in *Papachristou* and *Kolender*. Specifically, the ordinance provides no guidelines as to (i) what constitutes loitering -- that is, what is or is not an "apparent purpose," (ii) what persons are considered to be "'with" a suspected gang member, and (iii) what action will satisfy an order to "move on."

1. The ordinance vests an officer with unfettered discretion to conclude that a person does not have an "apparent purpose" and is therefore "loitering."

The ordinance defines loitering as "remain[ing] in any one place with no apparent purpose." Pet. App. 61a. Chicago and its *amici* argue that the ordinance does not vest the police with unfettered discretion to determine whether a person is "loitering."

However, the Illinois Supreme Court found to the contrary, holding that the ordinance provides the police officer with "absolute discretion . . . to decide what activities constitute loitering." Pet. App. 15a. That decision was clearly correct.

Chicago's description of the "no apparent purpose" requirement as "straightforward[]" (Pet. Br. 30) is contradicted by its confusing assertions in this Court and elsewhere as to what would or would not be an "apparent purpose." For example, "gazing at the nighttime sky" and "loafing through the day" are apparent purposes, according to Chicago (Ill. App. Br. at 70-71), whereas standing on a public sidewalk to get fresh air, sitting on a park bench or simply chatting with friends is not. *See* Pet. Br. 38; Supp. R. II at 231. Chicago does not point to anything in the ordinance (or elsewhere) that would lead an officer to draw those distinctions.

Further, the fact that two persons are "chatting" should be apparent to the outside observer. To conclude, as Chicago suggests (Pet. Br. 38), that chatting is not an "apparent purpose" really means that "chatting" is not an *acceptable* purpose under the ordinance. The ordinance's language, however, provides no guidance as to why that or any other apparent purpose is unacceptable. The officer, therefore, is required to bring to bear his or her own personal predilections to conclude that "chatting" or "sitting," however apparent, is not an acceptable "purpose." Chicago's own examples make clear that what is a "purpose" and what is "apparent" are left to the officer's absolute discretion.

It is precisely such subjective, standardless discretion that results in enforcement decisions that may vary arbitrarily not only from officer to officer but from decision to decision by the same officer. *See, e.g.*, *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (holding ordinance void for vagueness where violation may have depended entirely on whether a particular officer was annoyed by conduct of persons subject to the ordinance); *Kolender*, 461 U.S. at 360-61 (holding loitering ordinance void for vagueness where officers had complete discretion to conclude whether suspects had

shown "'credible and reliable' identification"); *Papachristou*, 405 U.S. at 170-71 (holding vagrancy law unconstitutionally vague where the ordinance provided imprecise standards for enforcement, thus allowing persons to stand on public sidewalks, etc. only at the whim of the police). The "no apparent purpose" requirement is so amorphous that Chicago is even unwilling to state without equivocation that a parade or picketing is a clearly apparent purpose falling outside of the proscriptions of the ordinance. *See* Pet. Br. 10, 20 (acknowledging only that the ordinance would "rarely, if ever" apply to parades, picketing or protests).[8]

2. The ordinance vests an officer with unfettered discretion to conclude that a person is "loitering with" a suspected gang member.

The ordinance is imprecise in yet another way. The ordinance applies not only to persons reasonably believed to be gang members, but also to all persons who are deemed to be "with" a "loitering" gang member. While Chicago focuses on "street gang members and their cohorts" (Pet. Br. 9), the ordinance is clearly not so limited.[9] It applies to any and all persons with a "loitering"

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[8] Even the Solicitor General is unable to discern what constitutes an "apparent purpose" under the ordinance. In his *amicus* brief in support of the ordinance, the best that the Solicitor General can do is to suggest what the term loitering would "likely" include and would "not likely" include. *See* Amicus Brief of the United States ("U.S. Br.") at 16. Chicago and the Solicitor General reach different conclusions about what is or is not included. Whereas Chicago leaves open the possibility that picketing and protests may be subject to the ordinance, the Solicitor General assures the Court that demonstrations and picketing "will be apparent to outsiders" and thus beyond the ordinance. U.S. Br. 13.

[9] Even if its proscriptions were limited to persons believed by police to be gang members, the ordinance could encompass a substantial number of the young people in many communities -- particularly minority youth. In Denver, for example, African American and Hispanic youths dominated a list of suspected gang members compiled by police. The list itself was so large that it included approximately two-thirds of the African American males in the city between the ages of 12 and 24. Dirk Johnson, *Two Out of Three Young Black Men In Denver*

(continued...)

individual reasonably believed by the police officer to be a gang member. The ordinance, which requires no interaction between the suspected gang member and other persons, supplies no guidelines for an officer to use to determine whether a person is "with" the suspected gang member, as opposed to merely being near or in the general vicinity of a suspected gang member.[2/]

This absence of legislative standards leaves the officer with absolute discretion in enforcement. For example, according to Chicago, the presence of a single gang member in a public playground with 99 other non-gang members is sufficient to authorize an officer to order the entire group of 100 persons to disperse and to arrest any who refuse to do so. *See* Supp. R. II at 229-30. This is true, as discussed below, even if the other 99 persons have no knowledge that a suspected gang member is present in the public playground. It may well be unlikely that the police would oust or arrest 99 people because of the presence of a single suspected gang member. The ordinance permits it, however, and the decision as to how many and which of the 99 to threaten with arrest is left wholly to the whim of the officers.

3. The ordinance vests an officer with unfettered discretion to conclude that a person has failed to "move on."

The ordinance further provides that an officer shall order persons in violation "to disperse and remove themselves from the

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[2/](...continued)
Listed By Police as Suspected Gangsters, N. Y. Times, Dec. 11, 1993, at A-8. In Los Angeles in 1992, 47% of the African American males between the ages of 21 and 24 were listed on a gang database maintained by the police. Ira Reiner, *Gangs, Crime and Violence in Los Angeles: Findings and Proposals from the District Attorney's Office* 121 (1992).

[2/] The Solicitor General contends that the ordinance is limited to "gang members or those who participate in groups containing gang members." U.S. Br. 10. The ordinance, however, imposes no requirement of participation. Rather, it applies by its terms to all persons "with" a "loitering" suspected gang member.

area," what Chicago commonly refers to as a "move on" order. Pet. App. 61a. While Chicago contends that the "move on" order is clear and cannot be misunderstood (Pet. Br. 29), that is not so. The "move on" order is yet another unclear element of the ordinance that enhances the potential for arbitrary and discriminatory enforcement.

For example, the ordinance provides no guidelines as to how far one must move in order to be removed "from the area." The "area" is not defined geographically or even conceptually. There is no gauge by which either the police officer or the citizen can determine whether it would be sufficient to move across the street, down the street, out of a park, or to another neighborhood entirely.[2/] Nor does the ordinance provide any guidance as to the length of time that a person must remove himself or herself from the area in order to avoid arrest -- ten minutes? An hour? A day? The ordinance does not provide either the officer or persons subject to the ordinance with answers to these very basic questions.

In this manner, the "move on" order is critically different from the directive issued by the officer in *Colten v. Kentucky*, 407 U.S. 104 (1972). In *Colten*, the Court determined that a person could be ordered to "move on" where he was interfering with an officer issuing a traffic citation. The Court agreed that the order was "suited to the occasion." *Id.* at 109-10. Unlike "move on" orders under the ordinance here, in *Colten* one could easily understand, based on external clues provided by the occasion itself, that "move on" meant to remove onself from the immediate vicinity of the traffic incident for so long as it took the officer to issue the citation and conclude the incident.

[2/] The "area" could be very large. A city representative testified in a lawsuit brought by the ACLU under the Illinois Freedom of Information Act that locations designated for enforcement of the ordinance included parks and public housing developments. Deposition Transcript of Thomas Needham at 86, filed with the Circuit Court of Cook County, Illinois in *ACLU v. City of Chicago, et al*, 98 CH 10054. Some of Chicago's parks extend for miles and others are as large as many square blocks. Chicago's public housing developments may also be many acres in size, and may be home to persons told to leave the areas.

There are no such external limitations provided, however, where one is ordered to remove oneself "from the area" pursuant to the ordinance. There is no apparent geographic boundary that delineates the "area" or that establishes what would be a sufficient distance to avoid arrest. Nor is there an objective time limit that would indicate when one could return to the public area and not be subject to arrest. The officer has complete discretion to define the public area from which the citizen is excluded on pain of arrest and the duration of that exclusion. Such untrammeled power to banish any person deemed by the arresting officer to be undesirable understandably prompted one of Chicago's African American aldermen to say during City Council hearings that the ordinance is reminiscent of the "pass laws of South Africa." Fran Spielman, *Loitering Ban Passes; Alderman Bitterly Split on Anti-Gang Measure*, Chi. Sun-Times, June 18, 1992, at A-1.

B. The Ordinance Fails To Provide Actual Notice Of What Conduct Is Prohibited.

The ordinance fails to provide citizens with actual notice so that "ordinary people can understand what conduct is prohibited." *Kolender*, 461 U.S. at 357. For example, the ordinance does not, as discussed above, disclose what purposes the police may deem unacceptable. That critical omission not only invites arbitrary and discriminatory enforcement, but also leaves Chicago's citizens without any notice as to what behavior would be subject to the ordinance.

Chicago argues that the "move on" order provides notice that a person's conduct is subject to the ordinance. Pet. Br. 29. But, as even Chicago concedes, "[i]f police officers are afforded standardless discretion to order individuals to move on, the mere fact a police order is given does not serve to sustain the order." Pet. Br. 32. As discussed above, the ordinance does give police

that discretion.[9] Given that the meaning of the ordinance is defined by the "personal predilections" of the police, there is no way that a person can know what conduct will lead to a police order to "move on."

Moreover, although a predicate for arrest under the ordinance is the presence of a "loitering" suspected gang member, there is no requirement that any other individual in that same public place be on notice that a gang member is present. While Chicago focuses on "gang members and their cohorts," suggesting that a lack of knowledge is not likely, the ordinance is not in any sense limited to "cohorts." As discussed above, Chicago acknowledges that the mere presence of a single person reasonably believed by a police officer to be a gang member with no apparent purpose in a public playground with 99 other persons, none of whom are suspected of being gang members, is sufficient to authorize the officer to order all 100 persons to disperse and to arrest those who refuse to do so. Although the ordinance expressly provides that the fact that no gang member was present is an affirmative defense to prosecution (Pet. App. 61a.), the fact that an arrested person had no knowledge that a gang member was present apparently does not provide a defense. And, as the Illinois Supreme Court found, a person "has no way of knowing whether an approaching police officer has a reasonable belief that the group contains a member of a criminal street gang." *Chicago v. Morales*, 177 Ill. 2d 550 (1997) (Pet. App. 11a-12a.)

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In less than three years, the police in Chicago ordered 89,000 people to "move on" from public places and arrested 41,000 of them for failing to do so in a manner satisfactory to the arresting

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[9] The fact that the conduct prohibited by the ordinance is defined by the police officer on the beat is confirmed by Chicago's attempt to reassure this Court that the ordinance is limited in scope. Remarkably, Chicago states that "anyone can loiter alone, or even with others, including criminal street gang members, as long as they move along when directed to do so." Pet. Br. 44 (emphasis added). Thus Chicago concedes that one's right to stand in the streets or parks of Chicago is subject to the unforeseeable whim and caprice of the police.

officers. This large number of arrests for conduct as innocuous as standing on a public sidewalk[10/] makes clear that the ordinance is another version of the abusive and discriminatory "street sweeps" that have been consistently, and properly, condemned by courts and commentators.[11/] The Illinois Supreme Court recognized the true nature of the ordinance, noting that the City Council's intent in enacting the ordinance was to address gang members' ability to avoid arrest for crimes they commit by "craft[ing] an exceptionally broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets." *Chicago v. Morales*, 177 Ill. 2d 440 (1997) (Pet. App. 16a.) Under the long-standing precedent of this Court, the ordinance is unconstitutional.

II.
THERE IS NO REASON TO ABANDON THE *PAPACHRISTOU-KOLENDER* STANDARD

As explained above, and in the briefs of Respondents and their other *amici*, the ordinance is plainly inconsistent with this Court's established jurisprudence. Chicago implicitly recognizes that fact,

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10/ Chicago repeatedly refers to "visibly lawless behavior" as the target of the ordinance. *See, e.g.* Pet. Br. at 9-10, 12, 14, 16, 27. That is clearly not the case. If the behavior was truly "visibly lawless," the person would have an apparent, albeit a lawless, purpose and thus would not, by definition, be "loitering." Moreover, if people are "visibly lawless," they can be arrested under the laws they are violating. For those situations, the ordinance is unnecessary. It is clear that the ordinance intentionally targets behavior that is lawful or innocent. Chicago implicitly concedes as much, stating that it seeks to move persons on or arrest them to "prevent crime before it occurs." Pet. Br. 10 (emphasis added).

11/ During 1994 Chicago used the ordinance to make wholesale arrests as part of "Operation EDGE" in which more than 60 extra officers were assigned to target areas for up to eight hours. Robert Olmstead, *Cops taking EDGE in Crime Battles*, Chi. Sun-Times, July 5, 1994, at 14. In one Operation EDGE sweep in the Englewood neighborhood, 100 people were arrested, 69 of them for gang loitering. *Sweep Nets 100 Arrests*, Chi. Sun-Times, Feb. 6, 1994, at 4. During the summer of 1994, there were more than 2400 arrests in connection with Operation EDGE. Fran Spielman, *Daley to Simon: Quit "Nitpicking" Over Crime Bill*, Chi. Sun-Times, Sept. 1, 1994, at 12.

referring the Court to "commentators [who] have repeatedly called for courts to provide greater leeway for state and local governments to address signs of chronic disorder on the streets." Pet. Br. 15.[12/] The CNO *amicus* brief, authored by one of those commentators, is more forthright, asking this Court to abandon the *Papachristou-Kolender* standard except for those cases in which a law's impact is directed at a "politically disempowered minority." CNO Br. 6. In all other cases, Chicago's *amici* urge, this Court should apply a sliding scale of review that depends on the extent to which members of the affected communities support the challenged law and on the extent to which minority groups subject to the law have achieved political empowerment. *Id* at 11-16. They are wrong.

Although this Court recognized in *Papachristou* and *Kolender* that vague, standardless laws have the potential for racially discriminatory enforcement, the principles of those cases are race-neutral and are properly focused on the specificity that due process requires of all criminal laws, against whomever they may be enforced. Indeed, contrary to the suggestions of Chicago's *amici*, the facts of *Papachristou* were not limited to the arrest of a racially mixed group of defendants, but also included the separate arrests of several other defendants, whose race is not even identified. *See Papachristou*, 405 U.S. at 159-61. This Court has reiterated that standards of constitutional review are "not dependent upon the race of those burdened or benefitted." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989).

Chicago's amici also suggest that this Court need no longer be concerned about the reality and perception of abusive and discriminatory enforcement that are fostered by standardless laws

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12/ Chicago and its *amici* suggest, expressly and implicitly, that gang crime cannot be addressed effectively without giving police this "leeway." Even the Chicago Police Department rejected that notion. In testimony at the City Council Hearings, the Assistant Deputy Superintendent of Police testified that "there are already enough laws in the books at this point [that address the street gang problems], criminal laws, criminal penalties which are much different than the ones that are articulated in the ordinance." Supp. R. II at 181.

because racial minorities have achieved political empowerment. CNO Br.11-12. While it is certainly correct that the political influence of African American and Hispanic citizens is increasing in some of America's large urban areas, it is certainly not correct that conflict between the police and minority communities is no longer a concern.

As noted by former New York City Police Commissioner Patrick Murphy and former Newark Director of Police Hubert Williams:

> [A]lthough the police are better prepared to deal with residents of the inner city than they were 20 years ago, they are far from having totally bridged the chasm that has separated them from minorities - especially blacks - for over 200 years. There are still too few black officers at all levels. Racism still persists within contemporary police departments. Regardless of rules and guidelines, inappropriate behavior on the streets still occurs. Complaints about differential treatment, patrol coverage and response time persist.

Hubert Williams & Patrick V. Murphy, *The Evolving Strategy of Police: A Minority View, in* Perspectives on Policing (U.S. Dept. of Justice, Nat'l Inst. of Justice No. 13, Jan. 1990). See also discussion, *supra*, at nn.2-4.

The concerns noted in *Papachristou* and *Kolender* have not disappeared for the nation's minority communities. The long history of abuse of standardless laws by officers pursuing their "personal predilections" has produced a lingering corrosive tension between police and minority communities that law enforcement

professionals and commentators recognize as a major impediment to effective law enforcement.[13]

Neither is there any reason for the Court to abandon settled notions of due process because, as certain *amici* urge, the ordinance was "enacted at the behest" of minorities. CNO Br.14. The argument of the CNO Brief is premised on two erroneous propositions. The first is that the "minority community" speaks with a single voice that is dispositive for purposes of constitutional adjudication. There was and is substantial opposition to the ordinance within Chicago's minority communities. The ordinance was enacted over the strong objection of most of Chicago's African American aldermen and the editorial objection of the *Chicago Defender*, Chicago's principal African American newspaper. See discussion in CANS Brief 3 - 6.[14]

CNO's second erroneous premise is that once members of minority communities attain a degree of political power, discrimination will no longer be a matter of concern because minority leaders will not practice or countenance discrimination against "their own." This Court rejected that analysis in *Castaneda v. Partida*, 430 U.S. 482 (1977), a jury composition challenge. The state argued that it was highly likely that the large

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[13] A recent study reached the same conclusion, finding that "African-Americans are more likely to perceive that they are both personally and vicariously hassled by the police [that is, stopped or watched by the police when they have done nothing wrong]. Again, nearly half of African-Americans had been hassled personally and two-thirds knew someone who had been hassled ['vicariously hassled'], while the figures for whites in both cases were about one-tenth of those sampled." Sandra Lee Browning, *et al.*, *Race And Getting Hassled By The Police: A Research Note*, 17 Police Studies 1, 8 (1994).

[14] The need to be alert to the diversity of interests within a community has been noted by community policing experts. "Community, when used in the context of policing, is problematic. . . . Practitioners and researchers alike have discovered that the 'community' cannot be easily defined as a single, unidimensional or monolithic social group. More often, there are many 'communities of interest' within a single neighborhood." Dennis P. Rosenbaum *et al.*, *The Prevention of Crime Social and Situational Strategies* 191 (1998).

disparity between Mexican-American jury-eligible citizens and those summoned for grand jury service was attributable to something other than discrimination because Mexican-Americans held many elective county offices.[15] This minority empowerment, Texas argued, made it unlikely that the disparity was linked to racism because "Mexican-Americans would [not] discriminate against their own kind." 430 U.S. at 490. The Court rejected the argument, concluding that "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Id.* at 499.[16]

The *Casteneda* rule was reaffirmed just last Term, in *Oncale v. Sundowner Offshore Servs., Inc.*, 140 L. Ed. 2d 201 (1998). Referring to *Casteneda*, this Court noted that "in the related context of racial discrimination in the workplace we have rejected any conclusive presumption that an employer will not discriminate against members of his own race." 140 L. Ed. 2d at 206 (holding that same-sex discrimination is actionable under Title VII).[17]

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[15] In *Casteneda*, the state based its argument on the fact that Mexican-Americans were a majority of the county population, and controlled the county politically. Even CNO does not suggest that Chicago's African American and Hispanic communities control the city's political structure.

[16] Subsequently, lower courts have consistently rejected the presumption that minorities will not discriminate against other minorities. *See, e.g., Bowen v. Kemp*, 769 F.2d 672, 688 (11th Cir. 1985); *Bell v. Bolger*, 708 F.2d 1312, 1315 n.3 (8th Cir. 1983); *McWilliams v. Escambia County School Bd.*, 658 F.2d 326, 333 (5th Cir. Unit B 1981); *Eccleston v. Secretary of Navy*, 700 F. Supp. 67, 69 (D.D.C. 1988); *United States v. Thomas*, 787 F. Supp. 663, 676 n.18 (E.D. Tex. 1992).

[17] This rule finds considerable support in academic writing. *See* Peter M. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. Pa. L. Rev. 1041, 1083-84 n.139 (1984); Edward Patrick Boyle, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 Vand. L. Rev. 937, 966-

(continued...)

Finally, even if the ordinance did have the support of majorities in the African American and Hispanic communities (and there is no basis from which this Court could conclude that is the case), and those communities controlled the politics of the City of Chicago, it would not warrant this Court's abandonment of the fundamental proposition that due process requires criminal law to be sufficiently definite so that police and citizens know what behavior will be deemed unlawful. As this Court declared in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943);

> "the very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. . . .[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections."[18]

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[17](...continued)
67 n.38 (1993); James H. Colopy, *The Road Less Traveled; Pursuing Environmental Justice Through Title Vi of the Civil Rights Act of 1964*, 13 Stan. Envtl. L. J. 125, 136 (1994).

[18] Scholars of community policing have cautioned that apparent support from the community cannot legitimize otherwise objectionable police practices. "None of this is intended to make the police entirely subservient to communities and their desires. The police must continue to stand for a set of values that communities will not always honor. For example, the police must defend the importance of fairness in the treatment of offenders and the protection of their constitutional rights against the vengence of an angry community." Mark H. Moore, *Problem-Solving and Community Policing in* Modern Policing 1992, at 99-158 (Crime & Justice: A review of Research Series No. 15, 1992), M. Tonry & N. Morris, eds.). *Accord* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 Colum. L. Rev. 551, 658 (1997) ("police must resist rather than respond to community mandates that would violate the constitutional rights of others or require police to act beyond their lawful authority"); and Herman Goldstein, *Toward Community-Oriented Policing: Potential, Basic Requirements and Threshold Questions*, 33, Crime & Delinquency 6 (1987).

III.
THE GANG LOITERING ORDINANCE IS POOR POLICE PRACTICE AND THERE IS NO REASON TO BELIEVE IT WAS OR WOULD BE EFFECTIVE

It is widely recognized today that effective law enforcement requires cooperation between the police and the communities they serve in a mutual effort to solve problems of crime and community safety. *See, e.g.*, Rosenbaum *et al.*, *supra*, at 173-74. This approach is commonly referred to as community policing. Chicago and certain *amici* attempt to justify the "strong medicine," Pet. Br. 38, of the ordinance by claiming that the ordinance with its broad arrest power is simply a manifestation of community policing. They ask this Court to give Chicago "greater leeway," *Id.* at 17, and uphold the ordinance so that Chicago can address gang crime in accordance with what it deems to be modern police practice. But the ordinance is not an example of modern law enforcement. It is yet another example of old-style law enforcement measures rife with potential for abuse. Far from being an expression of community policing, it undermines the essential tenets on which community policing is founded and invites the abusive, discriminatory enforcement that has historically created barriers between police and minority communities.

Central to community policing is the strengthening of relationships between police and community residents. "At the heart of the community policing model is the empirically supported idea that the police are more effective in solving neighborhood problems when they use the resources available in the community than when they try to complete the task alone." Rosenbaum *et al.*, *supra*, at 180. The same truth was recognized by the Kerner Commission, which noted that,

> [i]t is axiomatic that effective law enforcement requires the support of the community. Such support will not be present when a substantial segment of the community feels threatened by the police and regards the police as an occupying force.

Report of the National Commission on Civil Disorders ("Kerner Commission Report") 158 (1968).

A second fundamental tenet of community policing is the use of innovative, flexible solutions to community problems that, unlike traditional law enforcement strategy, do not rely on arrest and prosecution. As stated by Prof. Moore, "The challenge is to use mechanisms other than arrests to produce resolutions and to look outside the department as well as within for usable operational capacity." Moore, *supra*, at 121; *see also* Rosenbaum, *et al.*, *supra*, at 179.[19]

The ordinance undermines both of these fundamental principles of community policing. Most importantly, the ordinance is more likely to weaken than to strengthen police-community relationships. The ordinance sweeps great numbers of people not otherwise in violation of any law into the criminal justice system for merely standing around. The number of persons caught within its wide net is staggering. Chicago's statistics show

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[19] One notable example of apparently successful community policing is San Diego, which implemented a Neighborhood Policing Philosophy in the late 1980's that emphasized alternatives to arrest and prosecution. During the period from 1990-1995, serious crime in San Diego fell by 36.8%. The number of misdemeanor and felony arrests in San Diego during the overlapping period of 1993-1996 also fell by 15%. Judith A. Greene, *Zero Tolerance: A Case Study of Police Policies and Practices in New York City*, Crime & Delinquency (forthcoming April 1999) (manuscript at 12). Another example is the Boston Gun Project, which dramatically reduced gun violence among Boston gangs by "reaching out directly to gangs, setting clear standards for their behavior [the cessation of gun violance], and backing up that message by 'pulling every lever' legally available when those standards were violated." David Kennedy, *Pulling Levers: Getting Deterrence Right*, Nat'l Inst. Just. J. (July 1998). Boston's enforcement of clear standards is in marked contrast to the standardless approach of the ordinance.

that during the less than three years that the ordinance was enforced, more than 89,000 people were ordered by police to "move on." More than 41,000 of those people were actually arrested for failing to respond to a police order in a manner that satisfied the particular arresting officer.[22] Thus, rather than reduce the adversarial interactions between the police and members of the community, the ordinance multiplied them.

The effect of such a large number of arrests under the ordinance not only reinforces the perception of the police as a hostile force, it damages further the reputation of the police in the community because the consequences of arrest are likely to be fleeting. Chicago Deputy Police Superintendent Gerald Cooper recognized that problem when testifying before the Chicago City Council concerning the then-proposed ordinance. After noting that the Cook County jail had a capacity of only 6,500 and that arrests in Chicago during the year prior to the enactment of the ordinance exceeded 350,000, Mr. Cooper stated:

> So what happened to those people. They all came out the other end.
>
> So, of course, that is a consideration for us because that makes our job even more difficult if people feel they can thumb their nose at us. If they feel so what, if the police do come along and take us to the station, we can get out on an I-bond. We will be back out on the street before they do.

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[22] The number of arrests increased dramatically throughout the three years that the ordinance was enforced. According to statistics prepared by Chicago and lodged with the Court, in 1993 there were 5,251 arrests under the ordinance, in 1994 there were 15,660 and in 1995 there were 22,056. *See* Richard M. Daley & Terry G. Hillard, *Gang and Narcotic Related Violent Crime: City of Chicago 1993-1997* (1998) ("Five Year Report").

> So what if we do have to go to court in a couple of weeks. We go to court. The courts are so crowded. They look at the case and they throw it out.

Supp. R. II at 176-77.

Cooper's implicit prediction that the ordinance would breed contempt for the police is borne out by the sheer number of people who failed to comply with police orders. The fact that nearly half of those who were ordered to move on were arrested for failing to do so to the satisfaction of the arresting officer represents a stunning number of citizens unwilling to heed a direct law enforcement order. This can be interpreted in several ways: (i) citizens resented the "move on" order in the face of their apparently harmless behavior; (ii) citizens had tremendous contempt for police generally; or (iii) police did not properly explain the consequences of failing to obey the "move on" order. In any case, the Chicago experience does not reflect successful community policing.

Another likely explanation for the large and increasing number of arrests is that the officers simply did not notify citizens to "move on" prior to taking them into custody. Instead they used the ordinance as a pretext to arrest or to "sweep" the streets of persons they deemed undesirable. Such street sweeps represent the antithesis of modern community policing. The ordinance is not -- unlike Boston's Gun Project -- targeted to enforcement of clearly defined standards of conduct. It is, rather, a continuation of a standardless approach to policing that has been repeatedly recognized as counterproductive since the Kerner Commission Report examined the causes of civil disorder in 1968.

Indeed, the Kerner Commission's discussion of police attitudes toward minority youth is apposite to this case:

> Some conduct [by the police] -- breaking up of street groups, indiscriminate stops and searches -- is frequently directed at

youths, creating special tensions in the ghetto where the average age is generally under 21.

• • •

Because youths commit a large and increasing proportion of crime, police are under growing pressure from their supervisors -- and from the community -- to deal with them forcefully. "Harassment of youths" may therefore be viewed by some police departments -- and members even of the Negro community -- as a proper crime prevention technique.

Kerner Commission Report, *supra*, at 159.

Even the commentators relied on by Chicago and its *amici* have recognized that "[s]treet sweeps," such as those invited by the ordinance, are not effective or constitutionally permissible. For example, George Kelling, explicating his earlier "Broken Windows" theory, cautioned that "[s]weeps, inherently a short term and legally marginal placebo, often worsen the situation for residents and local police: they alienate innocent youths caught up in them (as well as their parents), and are meaningless to real troublemakers for whom an arrest is a minor irritant." George Kelling & Katherine Coles, *Fixing Broken Windows* 166 (1996). Kelling further asserted that "the ideas presented in 'Broken Windows' were antithetical to the use of 'street sweeping' tactics targeted on 'undesirables.'" *Id.* at 22. Similarly, Debra Livingston has written that "[P]olice scholars advocating focus on neighborhood disorder also cautioned that employing resurrected . . . reform era methods to 'sweep up,' . . . 'move along,' and arrest persons threatening some conception of public order was dangerous, and contrary to the role for police that they endorsed." Livingston, *supra* note 18, at 581.

Chicago's half-hearted attempt to wrap the ordinance in the mantle of community policing cannot disguise the true nature of the ordinance -- a mechanism that permits the police to conduct street sweeps of precisely the sort that courts and responsible

commentators have correctly condemned as unconstitutional and ineffective.

IV.
THERE IS NO REASON TO BELIEVE THAT THE GANG LOITERING ORDINANCE WAS EFFECTIVE IN REDUCING GANG CRIME IN CHICAGO

Chicago contends that enforcement of the ordinance "had a substantial effect on the level of gang-related violence in Chicago." Pet. Br. 16. That contention is echoed by several of the City's *amici*. *E.g*, Amicus Brief of National District Attorneys' Association 11; CNO Br. 24. The United States, somewhat more cautiously, asserts that the ordinance "appears to have had significant impact." U.S. Br. 2.

There is, however, no significant evidence that enforcement of the ordinance produced any reduction in gang-related crime.[21] Chicago's own data flatly contradict its claim that "if fewer gang members are loitering . . . fewer of them -- and innocent people nearby -- will be shot to death." Pet. Br. 16-17. Chicago emphasizes that in 1995, the last year Chicago enforced the ordinance, gang-related homicide in Chicago dropped more rapidly than total homicides did. *Id.* Yet precisely the same trend prevailed during the next two years, a period when the ordinance was not being enforced.[22] Apparently, suspension of the ordinance

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[21] Whether the ordinance has an effect on crime does not, of course, affect constitutional analysis. It would likely reduce crime if all young men between the ages of 16 and 21 were confined, yet no one would suggest that such an approach would be constitutionally permissible.

[22] From 1995 to 1997, gang-related homicides dropped 13%, again a steeper decline than the 8% drop in the overall homicide rate for that two-year period. Chicago relies, in its Petition, on a contrast between homicide trends in 1995 and 1996: In the former year (when the ordinance was enforced), gang-

(continued...)

either reduced gang-related homicides or, more likely, it was simply irrelevant to homicide levels that are driven by far more complex phenomena.[23] None of the available evidence supports Chicago's claim that the ordinance reduced gang-related homicides.[24]

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[22](...continued)
related homicides fell faster than the total. For 1996, Chicago reports that gang-related homicides rose by 7%, though total homicides were still falling. Pet. Br. 16. However, Chicago's claims reflected a short-term statistical aberration. The following year, with enforcement of the ordinance still suspended, gang-related homicides dropped 19%, a much steeper decline than the 4% drop in the overall homicide rate for that year. *See* Five Year Report at 4-5.

[23] The latter view is held by the principal experts on the implementation of community policing in Chicago. *See* Chicago Community Policing Evaluation Consortium, *Community Policing in Chicago, Year Four: An Interim Report* (Nov. 1997) (discussing numerous factors that contributed to Chicago's declining crime rates but omitting any mention of the gang-loitering ordinance). The published article Chicago cites, Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 Am. Crim. L. Rev. 191 (1998), relies exclusively on data prepared in January 1996 and therefore takes no account of the downward trend in gang-related homicides that continued after enforcement of the ordinance was suspended. Viewed in light of the Police Department's own analysis of more recent data, the out-of-date Police Department claims relied on in Meares' article no longer have any conceivable relevance.

[24] In the new set of statistics that Chicago presents to the Court, Chicago refers for the first time to offenses other than homicide, and claims that suspension of the ordinance produced increases in 1997 in two selectively reported crime categories: "gang related aggravated battery with a firearm" and "drive-by shootings." Br. 16 n.11 (referring to the Five Year Report). But the trend in these two, highly particularized offense categories is on its face anomalous. If, as Chicago's data suggests, gang-related aggravated battery with a firearm rose by 11% and drive-by shootings rose by 10% at a time when gang-related homicides were declining by 19%, *see* Five Year Report at 5-7, then either the fatality rate for reported shootings dropped precipitously during the year or, more likely, the assumptions used to classify these offense reports changed significantly. There are strong grounds to suspect that less serious cases excluded in the earlier year (or perhaps not reported to the police) were reported and included in 1997. Even accepting this self-serving and unverified data at face value, therefore, there is strong reason to doubt whether the statistics in question were compiled on a (continued...)

CONCLUSION

Chicago and its *amici* contend that criminal street gangs are ushering in a new era in crime -- crime that cannot be controlled by existing laws, crime that demands the type of drastic preventative law that sweeps thousands of persons into the criminal justice system for standing on a public sidewalk or other public place. Chicago and its *amici* assure this Court that the constitutionality of the ordinance cannot be doubted, particularly because it is supported by members of the community. These arguments are not new. The ordinance is no different than other laws this Court has found unconstitutional. Indeed, this Court's admonitions in *Papachristou* easily could have been written expressly in response to Chicago's Gang Loitering Ordinance:

> The implicit presumption in these generalized vagrancy standards -- that crime is being nipped in the bud -- is too extravagant to deserve extended treatment. Of course, vagrancy statutes are useful to the police. Of course they are nets making easy the roundup of so-called undesirables. But the rule of law implies equality and justice in its application. Vagrancy laws of the Jacksonville type teach that the scales of justice are so tipped even-handed administration of the law is not possible. The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.

Papachristou, 405 U.S. at 171. Just as this Court correctly held in *Papachristou* that the Jacksonville loitering law was unconstitutional, the Illinois Supreme Court correctly held that Chicago's Gang Loitering Ordinance was unconstitutional.

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[24](...continued)
consistent basis. This Court has never before based a change of constitutional doctrine on unverified data that changes from month to month.

Accordingly, the judgment of the Illinois Supreme Court should be affirmed.

Dated: September 11, 1998

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In the Supreme Court of the United States

OCTOBER TERM, 1997

CITY OF CHICAGO,
Petitioner,

v.

JESUS MORALES, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF OF NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, NATIONAL ALLIANCE TO END HOMELESSNESS, NATIONAL COALITION FOR THE HOMELESS, CHICAGO COALITION FOR THE HOMELESS AND NATIONAL NETWORK FOR YOUTH AS AMICI CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a loitering ordinance is unconstitutionally vague when it prohibits two or more persons from remaining in a public place with no apparent purpose after a police officer, acting under a reasonable belief that one of the persons is a gang member, asks them to disperse.

2. Whether a loitering ordinance prohibiting two or more persons from remaining in a public place with no apparent purpose, impermissibly punishes involuntary conduct and arbitrarily denies personal liberties of freedom of movement, in violation of substantive due process.

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Pursuant to Rule 37.3 of this Court, *amici curiae* National Law Center on Homelessness & Poverty ("National Law Center"), National Alliance to End Homelessness ("NAEH"), National Coalition for the Homeless ("NCH"), Chicago Coalition for the Homeless ("CCH") and National Network for Youth ("NNY") respectfully submit this brief requesting that the Court affirm the decision of the Supreme Court of Illinois holding that Chicago's anti-gang loitering ordinance, Municipal Code of Chicago § 8-4-015, is unconstitutional.

INTEREST OF AMICI CURIAE[1]

The National Law Center is a not-for-profit organization established in 1989 to address issues relating to homelessness and poverty at the national level. Working with groups across the country, the National Law Center seeks to protect constitutional and other legal rights of poor and homeless people. The National Law Center has extensive experience with federal constitutional issues affecting homeless persons and regularly participates in legislation, public education and litigation, including as *amicus curiae*, to address such issues. These issues arise in many forms including: laws and policies aimed specifically at penalizing homeless people; generally applicable laws discriminatorily enforced against homeless people; and laws not specifically aimed at homeless people that are facially unconstitutional and pose a significant threat to homeless people, as in this case. The National Law Center's purpose here as *Amicus Curiae* is to protect the thousands of involuntarily homeless Chicagoans from the unconstitutional deprivation of their liberties.

The National Alliance to End Homelessness ("NAEH") is a non-profit membership organization working with the public, private and non-profit sectors to solve the problem of homelessness. NAEH's mission is to address the long-term solutions to homelessness. NAEH accomplishes this by working to direct national policy on homelessness and to increase the capacity of local organizations to deliver effective assistance.

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1 This brief is filed with the written consent of all parties. The written consents are on file with the Clerk of the Court. This brief was not authored in whole or in part by counsel for either party and no person or entity, other than the *amici curiae*, their members, or their counsel, made any monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

The National Coalition for the Homeless ("NCH"), organized in 1982, is a non-profit organization and membership network of state and local coalitions committed to the goal of ending homelessness. Toward this end, NCH engages in public education, policy advocacy and grassroots organizing. NCH works to meet the urgent needs and support the civil rights of people who either are homeless or at risk of becoming homeless.

The Chicago Coalition for the Homeless ("CCH") is a not-for-profit corporation located in Chicago, Illinois, which researches the causes of homelessness and advocates for solutions to the problem of homelessness. CCH is comprised of numerous organizations that serve and advocate for the needs of homeless individuals and others concerned about the needs of homeless people. CCH includes a law project which has substantial experience in protecting and advancing the rights of homeless persons in Chicago. Much of its work is targeted on assisting homeless families and their children, as well as older homeless youths. CCH, acting as *amicus curiae* here, shares the goals of protecting the thousands of involuntarily homeless people from unconstitutional police practices at issue in this case.

The National Network for Youth ("NNY"), founded in 1975, is a privately supported membership-based organization, which serves as an advocate for youth, their families and communities. With over 500 direct members and 1,500 constituents involved in its regional and state networks, NNY monitors key legislation and federal spending, engages in public policy debate, educates the public and strengthens the field of youth work. NNY is dedicated to ensuring that young people can be safe and grow up to lead healthy and productive lives.

STATEMENT OF THE CASE

This case is a constitutional challenge to the City of Chicago's anti-gang loitering ordinance, Municipal Code of Chicago § 8-4-015 (the "Ordinance").[2] Section 8-4-015(a) of the Ordinance provides:

> Whenever a police officer observes a person who he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

Municipal Code of Chicago § 8-4-015(a). Section 8-4-015(c)(1) defines "loiter" as "to remain in any one place with no apparent purpose."[3] Section 8-4-015(c)(5) defines "public place" to mean "the public way and any other location open to the public, whether publicly or privately owned."[4] Used in conjunction, these two definitions are particularly troublesome for homeless persons, who are often involuntarily in a "public place" "with no apparent purpose."

Simply put, in the context of homelessness, there is often no way to tell whether a myriad of activities have, or do not have, an apparent purpose. Homeless people often have no choice but to "remain" in one place for no apparent purpose. Homeless individuals on the street engage in a wide range of activities, including eating, sleeping, daydreaming,

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2 Munic. Code of Chicago § 8-4-015 (1992).

3 Munic. Code of Chicago § 8-4-015 (c)(1).

4 Munic. Code of Chicago § 8-4-015 (c)(5).

begging, searching for food and reading. During a typical day on the streets, a homeless individual might very well be observed at various times by strangers, including police, to have no apparent purpose. After finishing a meal, a homeless individual who pauses to rest before finding a public bathroom could be considered by some to have no apparent purpose. Homeless persons congregating in a public park, or reading on a park bench, may well be or appear to be purposeless to other persons.

Section 8-4-015(c)(2) of the Ordinance defines "criminal street gang" as an organization "whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity."[5] A "pattern of criminal gang activity" is defined as "two or more acts of criminal gang activity of which at least two such acts were committed within five years of each other and at least one such act occurred after the effective date of this Section."[6] Homeless individuals who are involuntarily in a "public place" "with no apparent purpose" generally have no means to determine whether others loitering nearby are members of a "criminal street gang" and, if so, whether they have committed at least two acts of "criminal gang activity" within five years of each other, with at least one such act occurring after June 1992.

Of course, if a homeless individual happens to have a family member who is a gang member, then that homeless individual would have reason to know of certain gang members' identity. This demonstrates the imprecision of the definition of "loitering" and the extreme breadth of the Ordinance. Since virtually all interaction between homeless family members takes place in public places, a police officer observing a homeless mother talking to her homeless

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5 Munic. Code of Chicago § 8-4-015(c)(2).

6 Munic. Code of Chicago § 8-4-015(c)(4).

daughter, a suspected gang member, might regard the two as having no apparent purpose and order dispersal of both. Yet such intimate conversation may have substantial purpose known only to the family members. Even if the conversation has no real purpose, it can only occur on the street because that mother and daughter have no place else to be.

Section 8-4-015(b) of the Ordinance provides that "[i]t shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang."[7] This section surely supplies no relief for those individuals who are living in public in the same general area as a "criminal street gang member." Moreover, it provided no relief to those who received and obeyed one of the approximately 43,000 unconstitutional "move along" orders.[8]

On September 28, 1993, the trial court granted the defendants' motion to dismiss the City of Chicago's action against them under the Ordinance, finding that the Ordinance violated the United States and Illinois Constitutions.[9] The Illinois Appellate Court affirmed, holding that the Ordinance was unconstitutional on the grounds that it was substantially overbroad in violation of the First Amendment, unconstitutionally vague in violation of the Fourteenth Amendment, impermissibly punishes status rather than conduct in violation of the Eighth Amendment, and permits arrest without probable cause to believe that a crime has been or will be committed in violation of the Fourth Amendment. *See City of Chicago v. Youkhana*, 660 N.E.2d 34 (Ill. App. Ct. 1995). The Supreme Court of Illinois unanimously affirmed the lower court's decision on the grounds that the Ordinance was impermissibly vague and a violation of substantive due process rights. *See City of Chicago v. Morales*, 687 N.E.2d 53, 59 (Ill. 1997), *cert. granted*, 118 S. Ct. 1510 (1998). It did not reach the other grounds ruled upon by the intermediate appellate court.[10]

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7 Munic. Code of Chicago § 8-4-015(b).

8 Brief of Petitioner at 16.

9 *See City of Chicago v. Youkhana*, 660 N.E.2d 34, 36 (Ill. App. Ct. 1995).

SUMMARY OF THE ARGUMENT

The Supreme Court of Illinois held the Ordinance to be unconstitutional. That ruling should be affirmed. If not affirmed, the vast discretionary power given to the police by this patently unconstitutional Ordinance will pose a threat to the nation's homeless community. Two statistical facts about the homeless population serve to define this threat. First, over 700,000 Americans are homeless.[11] Second, there are not enough shelter beds to house all of the homeless people in America.[12] Thus, many homeless people have no choice but to live in public. The homeless community, therefore, has a particular interest in opposing the City of Chicago's misguided efforts to attack the problem of criminal street gang violence.

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10 *Id.*

11 Martha R. Burt, *Critical Factors in Counting the Homeless*, 65 Am. J. Orthopsychiatry 334, 335 (1995).

12 James D. Wright & Joel A. Devine, *Housing Dynamics of the Homeless: Implications for a Count*, 65 Am. J. of Orthopsychiatry 320, 323 (1995).

While the problem of gang violence in American cities is serious, methods to combat the problem should be found that do not infringe upon the Constitutional rights of homeless people and others. The challenged Ordinance is facially unconstitutional because it is impermissibly vague and a violation of substantive due process.

First, the Ordinance is impermissibly vague in all its applications and poses a specific threat to homeless individuals. People of ordinary intelligence have no way to know whether they may be regarded by the police as being in a public place with "no apparent purpose" and many homeless people have no way to avoid such a classification. There is likewise no way to determine whether a gang member is nearby and, if so, whether that gang member has been engaged in a "pattern of criminal activity."

The Ordinance also fails to describe adequately what constitutes compliance with a "move along" order, further increasing the likelihood of arbitrary and discriminatory enforcement. The decision whether or not a person has adequately "disperse[d] and remove[d]" oneself is completely at the discretion of the police officer, thus providing a tool for discrimination against unfavored individuals. While this applies to all persons, it is particularly onerous for homeless persons.

In addition to being impermissibly vague, the Ordinance violates substantive due process in that it infringes on the well-established rights of all persons. Those who fail to comply with the "move along" order are arrested--clearly a restraint on their freedom of movement. Those who do comply are coerced into moving along in contravention of their own free will—also a clear restraint on the freedom of movement. Ultimately, they may be forced out of downtown areas containing a concentration of necessary social services,

without recourse for a malicious and erroneous issuance of an order to disperse.

Moreover, the Ordinance unconstitutionally criminalizes involuntary status. The more than 6,000 Chicagoans living in public every day are, in effect, subject to arrest for failing to comply with a "move along" order issued in response to a situation over which they have no control, namely, existing in public. The Eighth Amendment of the U.S. Constitution prohibits cruel and unusual punishment, including criminal liability based solely upon involuntary conduct necessitated by one's status as a member of a group.

The consequences of a "move along" order from the police are especially severe for homeless people. Homeless people often have all their possessions with them and find it difficult to move. They then must face the difficult choice between arrest and abandoning their possessions. Even more fundamentally, for involuntarily homeless people it is impossible to move out of public places, and thus they will inevitably have to repeatedly move, or leave the city altogether, or face arrest. No American should face such choices.

A majority of Chicagoans forced to live in public places inhabit areas of great poverty that are also frequented by criminal street gangs. As most gang-related crimes occur in public,[13] homeless people are inevitably subjected to violence perpetrated by these gangs. While persons who are not forced to live in public can escape to the relative safety of

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13 Richard M. Daley & Terry G. Hilliard, *Gang and Narcotic Related Violent Crime, City of Chicago 1993-1997* (June 19, 1998) (stating that in 1993, 92% of gang-related homicides were committed outdoors, 94% in 1994, 95% in 1995, 93% in 1996, and 93% in 1997) (hereinafter "*Gang and Narcotic Related Violent Crime*").

their homes, homeless individuals cannot. Thus, homeless people have an immediate interest in reducing the incidence of street crimes. An ordinance that unconstitutionally restricts the rights of all citizens and unconstitutionally punishes status, however, is certainly not an appropriate solution to this unfortunate situation.

The decision of the Illinois Supreme Court should be affirmed on the grounds that the challenged Ordinance is impermissibly vague and violates substantive due process.

ARGUMENT

I. INTRODUCTION: THE GROWING PROBLEM OF HOMELESSNESS

For over a decade, homelessness has been a significant and growing problem in America. Recent estimates place the nightly national homeless population at over 700,000.[14] Moreover, given the substantial turnover of the homeless population, some two million people experience homelessness each year.[15] According to a recent Columbia University study, over a five-year period from 1985 to 1990, 8.5 million people, 4.6% of the U.S. population, were

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14 Martha R. Burt, *Critical Factors in Counting the Homeless*, 65 Am. J. Orthopsychiatry 334, 335 (1995).

15 Martha R. Burt, *Critical Factors in Counting the Homeless*, 65 Am. J. Orthopsychiatry 334, 336 (1995); Maria Foscarinis, *Downward Spiral: Homelessness and its Criminalization*, 14 Yale Law & Policy Review 5 (1996).

homeless at some time.[16] As a result of the increase in the homeless population, the incidence of people living in public places has also grown. Emergency shelters are unable to accommodate all homeless individuals seeking shelter and thus, every night, there are at least as many homeless people living involuntarily in public as there are sheltered.[17] Additionally, shelters are typically closed during the day. Thus, not only are several hundred thousand people forced involuntarily to live in public during the night, but many more than that number are also forced to live in public during the day.

Many more Americans live on the edge of homelessness, teetering precariously between living under a roof or on the streets. In 1995, the shortfall of affordable housing reached record-high levels, with 4.4 million more low-income renters than low-cost units.[18] Also in 1995, 5.3 million Americans who rented housing had incomes below 50% of the local median and paid more than half of their income for rent or lived in severely substandard housing.[19] Inadequate housing conditions force the poorest Americans to use public places such as stoops, parks and streets to

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16 Bruce Link, *Lifetime and Five-Year Prevalence of Homelessness in the United States*, American Journal of Public Health, Vol. 84, No. 12, p. 1909 (Dec. 1994).

17 James D. Wright & Joel A. Devine, *Housing Dynamics of the Homeless: Implications for a Count*, 65 Am. J. of Orthopsychiatry 320, 323 (1995).

18 Jennifer Daskal, Center in Budget and Policy Priorities, *In Search of Shelter: The Growing Shortage of Affordable Rental Housing*, p. 9 (June 15, 1998) (hereinafter "*In Search of Shelter*").

19 U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *Rental Housing Assistance—The Crisis Continues: The 1997 Report to Congress on Worst Case Housing Needs*, p. 9 (Apr. 1998).

conduct ordinary human activities, such as relaxing and socializing, to a much greater extent than those with adequate housing. With small, overcrowded rooms, and without air conditioning on hot summer days, inadequately housed Americans share many challenges in common with homeless people. In many cases, the Ordinance will affect the two groups alike.

The City of Chicago alone had a 1995 affordable housing gap of 130,000 units.[20] Chicago currently has a homeless population of over 9,000 with a combined total of only 5,180 emergency shelter beds and transitional housing slots.[21] Therefore, almost 4,000 homeless individuals are forced involuntarily to live in public during the night, with an even greater number living in public during the day when many of the shelters are closed.[22] These individuals inhabit areas of Chicago plagued by gang activity, as street gangs exist in nearly every community in Chicago, with total gang membership estimated at 125,000.[23] Consequently, on a daily basis, there are thousands of homeless Chicagoans who will be found in proximity with gang members in a public place with "no apparent purpose." *See* Municipal Code of

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20 *In Search of Shelter*, *supra* n. 19 at 50.

21 *See* National Law Center on Homelessness & Poverty, *Access Delayed, Access Denied: Local Opposition to Housing and Services for Homeless People Across the United States* (Dec. 1997); *see also* Chicago Coalition for the Homeless, *Homelessness: The Causes and Facts*, p. 1 (1996) (placing the homeless population on any given day at as many as 15,000); *see also* Chicago Department of Human Services, *Homlessness Services Programs, Annual Report*, p. 10, 45 (1997) (placing number of shelter beds at approximately 4,000).

22 U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *A Report to the Secretary on the Homeless and Emergency Shelters*, p. 38 (1988).

23 *Gang and Narcotic Related Violent Crime* at Introduction.

Chicago § 8-4-015(c)(1) (defining the term "loiter"). Moreover, homeless people often live in areas of poverty where a large number of necessary social services are located. Because gangs tend to inhabit these same areas, homeless people often will be in a "public place" "with no apparent purpose" in the same area as gang members.

II. THE ORDINANCE IS IMPERMISSIBLY VAGUE IN VIOLATION OF DUE PROCESS GUARANTEES

A criminal statute is unconstitutionally void for vagueness when it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."[24] Stated another way, "the void-for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[25] The Ordinance here is impermissibly vague because its prohibitions are so obscure "that persons potentially subject to [the law] cannot know with fair assurance how to act in order to avoid liabiiity."[26] The Ordinance is also overbroad in that it sweeps in clearly

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24 *United States v. Harriss*, 347 U.S. 612, 617 (1954).

25 *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

26 Anthony G. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, Criminal Law Bulletin, vol. 3., no. 4, at 205, 217 (1967); *see Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

protected activity along with the illicit. Finally, the breadth and obscurity of critical definitions in the Ordinance offend due process in that they permit arbitrary and discriminatory arrests and convictions. The Supreme Court of Illinois correctly found that the Ordinance violates due process in that it is both "impermissibly vague on its face and an arbitrary restriction on personal liberties."[27]

A. The Ordinance is not sufficiently definite to give persons of ordinary intelligence a reasonable opportunity to distinguish between lawful and unlawful conduct.

It is well-established that a law or ordinance that is insufficiently definite will be void for vagueness.[28] The Chicago anti-gang loitering ordinance defines "loitering" as "remain[ing] in one place with no apparent purpose."[29] This definition fails to draw any objective distinction between innocent conduct and conduct likely to cause harm. As a result, the definition of "loitering" in the Ordinance does not sufficiently inform ordinary citizens of what conduct constitutes the act of loitering. Thus, the Ordinance is void for vagueness.

The Ordinance fails to give a person of ordinary intelligence adequate notice of the prohibited conduct. In

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27 *City of Chicago v. Morales*, 687 N.E.2d 53, 59 (Ill. 1997).

28 *Posters 'N' Things v. United States*, 511 U.S. 513, 525 (1994), *citing Kolender*, 461 U.S. at 357.

29 Munic. Code of Chicago § 8-4-015(c)(1).

common, every-day usage, the term "loitering" encompasses a broad range of meanings. If one is standing on a street corner smoking a cigarette, or sitting on a park bench, is he "loitering"? If he is eating, sleeping, daydreaming, panhandling, reading in public, is he in jeopardy under the Ordinance? Obviously, neither the Ordinance nor common sense provides an answer. Making matters worse, individuals who are not gang members are unlikely to realize when they are in proximity to a gang member or to someone who a police officer reasonably believes to be a member of a criminal street gang. This compounds the difficulty of ascertaining whether one's conduct is likely to be viewed as illegal.

By requiring a dispersal order based simply on a police officer's determination that a person present in a public place appears to have no purpose, the Ordinance builds in a highly imprecise and subjective standard. Indeed, one might imagine a variety of simple everyday scenarios in which a homeless individual going about his or her daily business might be thought, wrongly or rightly, to have no apparent purpose. With or without an apparent purpose, a homeless person is entitled to go about his or her ordinary business without threat of prosecution under the Ordinance. Further, and perhaps more fundamentally, conditioning the dispersal order on a determination of purpose, the Ordinance necessarily penalizes those who have no choice but to be in public places—and does so simply for that reason.

This Court's ruling in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), is precisely on point--the Ordinance's overbroad language sweeps in conduct that the legislature never intended to proscribe. In *Shuttlesworth*, this Court overturned a conviction under a Birmingham, Alabama city ordinance that made it unlawful for any person or any number of persons to "so stand, loiter or walk upon any street or sidewalk [in the city] as to obstruct free passage over, on

or along said street or sidewalk." *Id.* at 90. The ordinance, like that at issue here, also made it unlawful to stand or loiter on a city street or sidewalk after having been requested to move along by a police officer. *Id.* "The constitutional vice of so broad a provision," said the Court, "needs no demonstration." *Id.* at 90-1.

The Chicago anti-gang loitering Ordinance, as the Supreme Court of Illinois correctly held, is likewise overly broad. The problem of overbreadth is particularly troublesome to homeless persons. When a person is living in public, all of the daily activities are in public view. When in the vicinity of a gang member, that individual would be susceptible to a dispersal order or arrest under the Ordinance. Anyone who has ever walked down a busy street in a major U.S. city has seen homeless people engaged in the activities of their daily lives. Activities such as eating or waiting for a bus may have a readily apparent purpose. In contrast, for the typical passerby, a homeless individual sitting in an alley, or a doorway, or lying on a blanket or a cardboard box, may be considered not to have an apparent purpose.

It should come as no surprise that homeless people may in fact not have an apparent purpose to all their activities. Indeed, at times, almost all people lack a purpose to their activities, apparent or otherwise. However, most people have some place private to be when they have no apparent purpose. When relaxing, daydreaming, pausing to take a deep breath, gazing up into the sky, or engaging in any other activity which may have no outwardly (or inwardly) apparent purpose, most people have the option to do so in private, out of sight of others. For homeless people, there is no such luxury. Homeless people must perform all such activities in public.

For a person living on the streets, the burdens imposed by the Ordinance are unacceptable. It is difficult, if

not impossible, to determine when a homeless person is "remaining in one place with no apparent purpose." They do not have the luxury of being elsewhere. Therefore, whatever their purpose is, they will be on the streets and at risk of being chased out of the neighborhood by a police officer enforcing the Ordinance.

In addition, homeless persons are more likely than the average person to be found in areas characterized by high crime rates and gang activity. Thus, as a group, homeless people are particularly likely to be observed by a police officer with a member of a criminal street gang.

The City of Chicago argues that the Ordinance is saved by the requirement of a police order to disperse, prior to arrest. However, as was the case in *Shuttlesworth*, this argument lacks merit. While the order to disperse certainly gives individuals an opportunity to leave the scene, one's failure to do so will result in an arrest without any idea of the nature of the criminal act that has been committed. The dispersal order does nothing to inform the subject "what the State commands or forbids" and so it does not cure the constitutional infirmity of vagueness.[30]

B. The Ordinance permits arbitrary and discriminatory enforcement by police.

While the underlying rationale of the void-for-vagueness doctrine requires that a statute be definite enough to serve as a guide to an individual's conduct, a more important aspect of the doctrine "'is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law

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30 *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

enforcement.'"[31] Without such guidelines, the Ordinance unconstitutionally permits a "standardless sweep [that] allows policeman, prosecutors, and juries to pursue their personal predilections."[32]

As this Court observed in *Shuttlesworth v. City of Birmingham*, 382 U.S. at 90-1, an overbroad law is unconstitutional because it "does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat." [Citation omitted]. *Id.* at 90-1. The Court suggested a literal application of the Birmingham ordinance that is directly relevant here: "that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city." *Id.* at 90. As the Court noted, "that kind of law bears the hallmark of a police state." *Id.* at 91.

Similarly, in *Kolender v. Lawson*, the Court found a California loitering statute to be unconstitutionally vague because it "vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest." *Kolender*, 461 U.S. at 358.

Just as in *Kolender*, the Ordinance here gives police too much authority and unfettered discretion, creating the "potential for arbitrarily suppressing First Amendment liberties...." *Kolender*, 461 U.S. at 358, *quoting Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965). Because the Ordinance fails to establish clear minimal guidelines to govern the Ordinance's enforcement, the Ordinance leaves police officers to enforce the Ordinance

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31 *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), *quoting Smith v. Goguen*, 415 U.S. 566, 574 (1974).

32 *Id.*, *quoting* 415 U.S. at 575.

according to their own personal conceptions of what constitutes "remain[ing] in one place with no apparent purpose."

An example illustrates the dangers of this Ordinance: an individual sits on a park bench, near a suspected gang member (to the eye of a police officer). The police officer believes that the individual is doing nothing. In the case of a homeless person, however, the person doing "nothing" may be holding an empty paper cup used for panhandling. The Ordinance leaves it to the whim of the police officer to try to make the fine distinction between truly "doing nothing" and waiting for a passing stranger to throw a quarter in the paper cup. This example also highlights the absurdity, as well as the constitutional infirmity, of making "doing nothing" a criminal act. Furthermore, allowing a police officer to decide whether to ask this individual to move on clearly vests that officer with the unconstitutional discretion to punish innocent conduct. And, giving police officers such unfettered discretion leaves the courts with the task that is properly left to the Legislature—determining the limits of the law's application.

The existence of such discretion has been held by this Court as a reason to declare a law unconstitutionally vague and overbroad. In *United States v. Reese*, this Court said that:

> [i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.

United States v. Reese, 92 U.S. 214, 221 (1876); see *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165

(1972) ("[h]ere the net cast is large, not to give the courts the power to pick and choose but to increase the arsenal of the police"). The Chicago Ordinance is indeed dangerous to many innocent citizens whose only "crime" is that they have no place to go but the streets.

Other circumstances combine to heighten the risk of arbitrary application of the Ordinance to the homeless community. First, approximately 25% of the homeless population consists of children.[33] Criminal street gangs in Chicago are composed of a high percentage of teenage children.[34] Because a significant portion of both the homeless population and the gang population are teenage children, there is a likelihood for confusion between the two groups.

Second, homeless individuals often congregate for purposes of receiving social services, such as meals and healthcare. Seeking safety in numbers, they also frequently congregate at night. Their tendency to congregate in groups increases the chance that a police officer will apply the Ordinance to homeless individuals.

Third, since homeless people often have all of their possessions with them or nearby, they may be particularly reluctant to move on, making arrest far more likely than for those who are more mobile. Also, homeless persons may move along, only to be ordered later to disperse again.

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33 Paul Leavitt, *Food-Shelter Requests On The Rise, Mayors Say*, USA Today, Dec. 20, 1995, at 3A.

34 In 1997, 21% of offenders arrested for gang related homicides were younger than age 17, and 69% were younger than age 21. *Gang and Narcotic Related Violent Crime* at 2.

The Ordinance also has a harmful chilling effect on humanitarian efforts designed to help homeless persons. Dispersal orders and arrests for disobeying such orders are likely to affect volunteers and workers in the business of providing services to homeless persons. For example, certain individuals and organizations provide essential social services to homeless persons, including medical and psychiatric treatment. Others are involved in valuable outreach programs, designed to reconnect homeless people with the world around them. Still others seek to engage the homeless for religious purposes or for voter registration. Providers of such services, which benefit society in general by fighting to end the despair of homeless persons, are placed at risk by the Ordinance and their services may be diminished. Ultimately, the chilling effect created by the Ordinance takes it greatest toll on the homeless themselves, who lose the vital services on which they depend.

The unique circumstances of homeless individuals and their non-profit support network serve to highlight the constitutional vagueness of the Ordinance, which both fails to distinguish between permissible and impermissible conduct, and also permits arbitrary and discriminatory enforcement by police.

III. THE ORDINANCE VIOLATES SUBSTANTIVE DUE PROCESS GUARANTEES

The Ordinance is also constitutionally inadequate because it violates due process guarantees. First, because they have no place else to be but on the streets, homeless persons face criminal penalties under the Ordinance for their

involuntary condition of homelessness. Such a penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment and the Due Process clause. Second, the Ordinance abridges the freedom of movement.

A. The Ordinance impermissibly punishes involuntary conduct.

Chicago's anti-gang loitering ordinance unconstitutionally criminalizes status by permitting arrest and conviction in the absence of any criminal conduct. The Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such."[35] The loitering statute inflicts a "cruel and unusual punishment" in violation of the Eighth Amendment, made applicable to the States by the Due Process Clause of the Fourteenth Amendment.

For many homeless Americans, living on the streets is an unfortunate and unavoidable way of life. Stated in the simplest of terms, they have no place else to be. To criminally sanction homeless individuals for "remain[ing] in one place with no apparent purpose" is to punish those individuals for existing. Homeless people are on the streets

35 *Bell v. Wolfish*, 441 U.S. 520, 535, n. 16 (1979) (applying Eighth Amendment standards through the Due Process Clause to pretrial detainees); *Ingraham v. Wright*, 430 U.S. 651, 667 (1977); *see* U.S. Const. amend. VIII. Challenges to police action under the element of the Eighth Amendment that imposes "substantive limits on what can be made criminal" do not require conviction or punishment as a precondition to constitutional review. *See Wheeler v. Goodman*, 306 F. Supp. 58, 60 (W.D.N.C. 1969) (holding vagrancy law violative of Eighth Amendment although complaining parties were not convicted), *vacated on other grounds*, 401 U.S. 987 (1971); *United States v. Moore*, 486 F.2d 1139 (D.C. Cir.) (Court considered Eighth Amendment argument in motion to dismiss indictment prior to conviction, rejected on other grounds), *cert. denied*, 414 U.S. 980 (1973).

precisely because they have nowhere else to be. With a growing homeless population and a shortage in temporary housing, homeless people are increasingly forced to perform daily essential living functions on the street and in public spaces. In Chicago alone, over 6,000 homeless individuals are forced to live in public during the day, with as many as 4,000 sleeping on the streets at night.[36]

Two cases in this Court define the contours of this area of Constitutional protection. First, in *Robinson v. California*, 370 U.S. 660, 666-67 (1962), the Court compared a statute that criminalized "being addicted to narcotics" with a criminal ban on mental illness or leprosy. *Id.* at 667 n. 8. Because the violation was based on the arrestee's status as a narcotics addict, the Court struck down the law as a violation of the Eighth Amendment.

Subsequently, in *Powell v. Texas*, 392 U.S. 514, 533 (1968), the Court distinguished the punishment of acts necessitated by one's status (the result of "irresistible compulsion") from those acts claimed merely to be linked to a person's status. Powell had been convicted of public drunkenness, and alleged that the law in fact criminalized his status as a chronic alcoholic. A plurality of the Court held that Powell failed to establish as a matter of fact that his status as a chronic alcoholic necessitated that he be drunk *in public* and thus concluded that the Eighth Amendment had not been violated. In a concurring opinion, Justice White noted that, for certain persons, being in public may not be voluntary:

> Although many chronics have homes, many others do not. For all practical purposes the public streets may be home for these

36 *See supra* note 21.

> unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. This is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition. For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment – the act of getting drunk.

Powell, 392 U.S. at 551 (White, J., concurring).

What Justice White raised as a hypothetical in *Powell* is squarely at issue here. Even more clearly than a law penalizing a chronic alcoholic for the act of getting drunk, or a gang member for merely sitting with friends in public, a statute that penalizes a person for simply occupying the only space he or she is able to occupy must be cruel and unusual. No act of will can overcome a person's ongoing need to be somewhere--to take up space as long as he exists.

Whether engaged in some life-sustaining act such as eating or sleeping, or simply being on the street with no apparent purpose, homeless people have to be somewhere. For homeless individuals and families, living in public is an unavoidable and involuntary way of life. Homeless people in Chicago and the nation's other urban centers have no other place to be but in public.[37] To impose criminal penalties on

[37] The plurality in *Powell* rejected the claim that the punishment of acts committed under a "strong compulsion" arising from one's status violated the Eighth Amendment. For instance, a drug addict may be "strongly compelled" to steal to support his addiction, but the robbery may be punished without violating the Eighth Amendment. *Amici curiae* here does not argue otherwise. Rather, we argue that for involuntarily homeless persons, remaining in a public place--when there is no other place to be--is the result of necessity or an "irresistible compulsion" and this cannot be punished consistent with *Powell* and the Eighth Amendment. *See Pottinger v. City of Miami*, 810 F. Supp. at 1551 (S.D.Fla. 1992); *Powell*, 392 U.S. at 535.

homeless individuals for being on the streets without apparent purpose, criminalizes involuntary conduct that is impossible for homeless persons to avoid. In effect, as applied to homeless persons, this Ordinance criminalizes their very existence. This is cruel and unusual treatment in violation of the Eighth Amendment.

B. The Ordinance abridges the liberty interest in freedom of movement under the Due Process Clause.

In *Kolender*, the Court stated that arresting people for loitering or wandering in public without proper identification "implicates consideration of the constitutional right to freedom of movement." *Kolender*, 461 U.S. at 358, *citing Kent v. Dulles*, 357 U.S. 116, 126 (1958). Subjecting any American, homeless or otherwise, to arrest and criminal prosecution for moving about in public places or staying in one public place also offends basic principles of liberty protected by the Due Process Clause. Professor Charles A. Reich said:

> I know of no law that requires me to have either a purpose or a destination. If I choose to take an evening walk to see if Andromeda has come up on schedule, I think I am entitled to look for the distant light of Almach and

> Mirach without finding myself staring into the blinding light of a police flashlight.

Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 Yale L. J. 1161, 1172 (1966). Professor Reich's comments embody a belief that all Americans enjoy a liberty interest in wandering about aimlessly with no apparent purpose, in loafing, in wandering freely, or standing still freely, all activities that this Court describes as "historically part of the amenities of life as we have known them." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972).

This Court has found that "arresting individuals for loitering or wandering on public streets without identification 'implicates consideration of the constitutional right to freedom of movement."[38]

In addition to judicial sources, the liberty interest in freedom of movement is well documented as part of a longstanding American literary tradition.[39] Furthermore, its importance has increased with the growth of large urban residential communities and the simultaneous shrinking in the amount of personal space for the residents of those communities. These residents include homeless people, for whom personal space has merged with public space. The Ordinance infringes on the liberty of movement enjoyed by all Americans under the Due Process Clause of the Fifth Amendment.

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38 *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1579 (S.D. Fla. 1992), *quoting Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

39 *See Papachristou*, 405 U.S. at 164 and n. 7.

CONCLUSION

For the reasons stated above, the City of Chicago's anti-gang loitering Ordinance is unconstitutionally vague, punishes involuntary conduct and unconstitutionally restricts the freedom of movement, in violation of substantive due process. The judgment of the Supreme Court of Illinois should be affirmed.

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CITY OF CHICAGO,

Petitioner,

v.

JESUS MORALES, ET AL.,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Illinois

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QUESTION PRESENTED

Is Chicago's Gang Congregation Ordinance (Chi.Mun. Code, Sec. 8-4-015 (June 17, 1992)) unconstitutional because it seeks to impose criminal penalties based solely on an individual's status, rather than upon any affirmative misconduct in which that individual may be involved, without providing a clearly understood standard of conduct, thus trammeling upon rights contained in the Federal and Illinois Constitutions?

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INTERESTS OF AMICUS CURIAE

The Illinois Attorneys For Criminal Justice (hereinafter "IACJ") is an association of criminal lawyers concerned with the preservation of justice in Illinois courts. IACJ is dedicated to fostering, maintaining and encouraging the integrity, independence and expertise of criminal defense lawyers. The mission of the IACJ is to preserve the adversary system of justice and to ensure due process for persons accused of crime. IACJ membership is limited to practitioners engaged in defense of the accused. Simply put, the IACJ membership consists of attorneys practicing in the criminal courts on a daily basis, confronting the reality of laws such as Chicago's Gang Congregation Ordinance.[1]

SUMMARY OF ARGUMENT

While no one, least of all the IACJ, questions the danger posed by criminal street gangs in the City of Chicago, the fact remains that any effort to control their pernicious conduct must comport with our Constitution. Both the Illinois Appellate and Supreme Courts found the city's Gang Congregation Ordinance (Chi.Mun.Code, Sec. 8-4-015 (June 17, 1992)) deeply offensive to the Federal and Illinois State Constitutions for a litany of reasons. When all these various failings are distilled down to their essentials, one central flaw is crucial: the Ordinance is not triggered by any specific misconduct of either gang members or of mere citizens found in their proximity; instead, the Ordinance which commands their compliance is conditioned on status.

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[1] The parties have consented to the filing of this Brief. Copies of the consent letters have been lodged with the Clerk of this Court. This Brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae*, its members, and their counsel, have made monetary contribution to the preparation and submission of this brief.

A generation ago, in *Robinson v. California*, 370 U.S. 660 (1962) addressing an equally grave problem (drug addiction), this Court condemned status-based statutes requiring no misconduct to sweep an accused within its penal net. Subsequently in *Powell v. Texas*, 392 U.S. 514 (1968), this Court indicated that where status is linked to conduct, a statute may survive constitutional scrutiny. But the requirement of some form of conduct warranting application of criminal sanction is one deeply rooted in this Court's jurisprudence (see, *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (striking a similar statute directed against gangs on vagueness grounds); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (striking on vagueness grounds an ordinance purporting to regulate street annoyances)). The common factor linking all these cases (as well as those cited by Petitioner) is that a statute must specify some form of conduct, with enough particularity, that the average citizen is given notice of what conduct he must avoid, and the police are given some guidance to prevent wholly arbitrary enforcement.

Here, the Ordinance does not predicate its operation on any conduct; in fact, in fashioning the Ordinance the Chicago City Council expressly bemoaned the fact that actual criminal conduct was shielded from police action. Thus, the city fashioned a new tool to add to the police arsenal: the ability to enforce the shunning of gang members based purely on their status. The Ordinance is inert in the absence of a gang member. If one is present, however, the Ordinance comes to life, sweeping up all gang and non-gang members in its path.

The absence of a conduct element thus opens the door to the plethora of problems that have long deprived such statutes of constitutional support: a lack of notice to citizens who must conform with the law; and a wholesale grant of law-making power to the police, both as an institution and individually. It is, after all, the police who internally determine who is a gang member; these determinations are not part of the Ordinance, and hence are

outside even the constructive knowledge of the public. It is the police who determine, again *sub rosa*, what parts of the city will be subject to enforcement of the Ordinance, and when such enforcement shall be applicable. It is the police who determine whether anyone, gang member or not, has an apparent purpose for his or her presence in any particular public place. And indeed, even the city admits that under the Ordinance, a non-gang member who is doing absolutely nothing illegal may be forced to surrender his spot in the public way simply because a police officer sees another person he subjectively believes is a gang member nearby.

The city's parallel rejection of the status-driven basis of its Ordinance is similarly strained. The city claims that there is a conduct element: the failure to comply with a police order to leave. But as the police only issue this order where a gang member is present, regardless of conduct leading to the order, the status nature of the Ordinance remains clear.

The Ordinance simply defies this Court's rulings, creating a status-based offense which neither provides notice to the public nor guidance to the police. The courts below should be affirmed accordingly.

ARGUMENT

No one disputes the laudable goal of making the streets safer for the citizens of the City of Chicago, or anywhere else. Promotion of public safety and welfare are, after all, central purposes of any democratic government, and the basis for the delegation of generalized police powers to that government. But promotion of these goals ought not be done at the expense of basic freedoms that governments are bound to protect: those of association and assembly, and those indelible rights to allow the citizens of this country to move about the public way unimpeded by other citizens, law enforcement, the military, members of any political or social group, etc. This country was founded upon principles that all are created

equal and all share equal rights and equal privileges. The courts of this country have and must continue to safeguard these rights, rights that belong to *all*, including gang members or those standing nearby. That is the foundation of our concept of a republic.

The City of Chicago's Gang Congregation Ordinance (Chi.Mun. Code, Sec. 8-4-015; hereinafter, "Ordinance") is of grave concern for a myriad of reasons, many detailed in the decisions of the Illinois Supreme Court (*People v. Morales*, 177 Ill.2d 440, 687 N.E. 2d 53 (1997) and the Illinois Appellate Court (*People v. Youkhana*, 277 Ill.App.3d 101, 660 N.E.2d 34 (1st Dist. 1995)). Although the particular problems prompting the instant *amicus* brief are as wide-ranging in their effect as those examined by the Illinois state courts, the focus here is narrower: the IACJ is most concerned because the ordinance represents a sea-change in method. The Ordinance jettisons any requirement that police action be conditioned on any misconduct, focusing instead on the perception that mere gang status is actionable. The Ordinance becomes even more odious when applied to non-gang members: their liberties are truncated without reference to either their conduct or their status. They are merely in the wrong place at the wrong time.

I. THE ORDINANCE IS STRUCTURED TO RESTRICT A NON-GANG MEMBER'S LIBERTY TO ENJOY THE AMENITIES OF THE CITY BASED UPON THE STATUS OF THOSE IN PROXIMITY TO HIM

In *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972), this Court extolled the virtues of walking, strolling, wandering, loafing and loitering as "historically part of the amenities of life as we have known them." No doubt, at some point most citizens of Chicago take the time to simply cast back and gaze at the skyline, enjoy the night air, or otherwise loiter for the pleasure of inactivity. Under the Ordinance, their ability to so enjoy the city is

eroded, ironically in the name of protecting their very ability to enjoy the pleasures of such tranquility. The Ordinance renders the lay citizen's right to stand and watch dependent, not on any conduct of his own, but on his mere proximity to someone else.

The framework adopted by the City Council is rather simple, contemplating a two-step process: identification and subsequent police action. The Ordinance recites:

> "Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section" (Chi.Mun.Code, Sec. 8-4-015(a)).[2]

Phrased simply, whenever a police officer sees two or more people, any of whom he subjectively believes is a gang member, he may order everyone to disperse if he fails to perceive a rationale for their presence in the public way. Under the Ordinance, this dispersal order affects not only the perceived gang member, but also the

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[2] The Ordinance defines "loiter" as staying in any one place without apparent purpose (Chi. Mun. Code, Sec. 8-4-015(c)(2)). A "criminal street gang" is defined as:

> "any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more [enumerated criminal acts] and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity" (Chi. Mun.Code, Sec. 8-4-015(c)(2)).

A "public place" is similarly broadly defined to encompass the public way and any other location open to the public, whether publicly or privately owned (Chi. Mun.Code, Sec. 8-4-015(c)(5)).

wholly innocent bystander who may find himself in proximity to the purported gang member. Failure to comply may result in arrest, jail and/or a fine.

The simplicity of the Ordinance conceals a wealth of nuance and subtlety. For example, the Ordinance is not designed to apply throughout the city. General Order 92-4, promulgated under the Ordinance, vests in "district tactical officers and other personnel with knowledge of gang activities" the authority to designate areas for application of the Ordinance (Gen.Order 92-4, VI(A)(1)). Because this designation is dependent, in part, on crime pattern information (Gen.Order 92-4, VI(A)(2)(a)), it is likely that such designations will be transient. Assuming that police enforcement is designed to reserve in the police the element of surprise (and the General Order only directs that area designations be disseminated to the Gang Crimes Section (Gen.Order 92-4, VI(A)(4))), this information will not be publicly disclosed.

Nor is the area of enforcement the only hole card held by the police under the Ordinance's structure. The Ordinance and General Order also make a shell game of gang membership status. The General Order confers on certain officers the power to act as magistrate, making probable cause determinations of membership status. Although couched in terms of probable cause, the General Order does not contemplate any prior judicial review of those determinations.[3]

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[3] Section V of the General Order merely provides some criteria for the police officers' determination, including:

A. the individual's admission of membership.

B. the wearing of distinctive emblems, tattoos, or similar markings indicative of a specific criminal street gang, but only when such emblems, tattoos, or similar markings would not reasonably be expected to be displayed by any individual except a member of that specific criminal street gang, and membership may not be established solely because an individual is wearing clothing available to the general public.

C. The use of signals or symbols distinctive of a specific criminal street gang.

D. the identification of the individual as a member of a specific criminal street gang by an individual who:

1. has provided reliable information to the Department in the past or whose information can be independently corroborated; and

2. alleges that the individual in question is a member of a specific criminal street gang. (Gen. Order 92-4, Part V)

Nowhere is there any suggestion that this "probable cause determination" be submitted to an impartial magistrate as a condition precedent to the officer's authority to order otherwise law-abiding citizens to leave a public place. While the Ordinance makes the absence of a gang member an affirmative defense (Sec. 8-4-015(b)), the General Order effectuating the Ordinance shelters the gang information files (and hence the probable cause determination) from public disclosure absent a court order.

Thus, the Ordinance and the enabling General Order structurally are designed to insulate the public from knowing either where the Ordinance will apply, or whom they must avoid. In substance, and by design, the Ordinance attempts to attach to gang members a "Scarlet Letter," and by doing so vest the police with the power to order their shunning by the public. While this may be an honored tradition in some circles, it holds no parallel in American law. This effort to criminalize status in lieu of any action or misconduct is most troubling, and dangerous. When analyzed logically, it reveals all of the inherent problems that deprived the Ordinance of constitutional support at all levels of the Illinois judicial system.

II. THE ORDINANCE IS NOT INTENDED TO DIRECTLY ADDRESS ANY CRIMINAL ACTIVITY. INSTEAD, IT IS INTENDED AS A TOOL FOR THE POLICE TO BE USED IN THE ABSENCE OF EVIDENCE OF CRIMINAL ACTIVITY.

As noted in the debates before the Chicago City Council, it is sometimes difficult to reach beyond the actual criminal activities of gangs and attack them "in utero" – because of the criminal nature of their acts and the insularity of their organization, a street gang is difficult, sometimes surpassingly so, to address. And to be sure, addressing such entities after they have committed criminal acts, while essential to ordered liberty, is painfully too late for those who suffer from their predations. Thus the IACJ does not quarrel with the idea that legislative bodies must be given some rein within which to seek answers to those problems, and to experiment with varied approaches to specific problems in an effort to reach a fair and just result. But it is crucial to realize that experiments fail. The IACJ would respectfully suggest that, viewed in light of our nation's greatest success, the Constitution and its careful balancing of individual and societal needs, the instant Ordinance is a failure.

This Ordinance is predicated on two premises: first, that the subjective perception of gang status by a police officer is actionable by itself; and second, that once such perception is subjectively realized, the State may take action affecting both the putative gang member and the public, wholly outside the judicial process. As addressed below, neither premise is constitutionally sound.

Viewed in this vein, it is clear that the Ordinance is completely status-driven. In its preamble, the Chicago City Council made no bones over this fact; it frankly confessed that the problem of dealing with gangs based on their conduct was beyond its ability to control:

> "WHEREAS, the City of Chicago, like other cities across this nation, has been experiencing

> an increasing murder rate as well as an increase in violent and drug related crimes; and
>
> WHEREAS, the City Council has determined that the continuing increase in criminal street gang activity in the City is largely responsible for this unacceptable situation; and
>
> WHEREAS, In many neighborhoods throughout the City, the burgeoning presence of street gang members in public places has intimidated many law abiding citizens; and
>
> WHEREAS, One of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas; and
>
> WHEREAS, Members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present, while maintaining control over identifiable areas by continued loitering; and
>
> WHEREAS, the City Council has determined that loitering in public places by criminal street gang members creates a justifiable fear for the safety and property in the area because of the violence, drug-dealing and vandalism often associated with such activity; and
>
> WHEREAS, the City also has an interest in discouraging all persons from loitering in public places with criminal street gang members; and
>
> WHEREAS, Aggressive action is necessary to preserve the city's streets and other public places so that the public may use such places without fear" . . . (Chi.Mun. Code, Sec. 8-4-015)

Faced with the inability to curb activity based on conduct, the City Council fashioned an entirely new tool: pre-emptive dispersal based on status.[4]

The fact that the Ordinance does not address any criminality is borne out by both practical reality and the City's own brief. Any police officer that has knowledge of criminality, it must be assumed, would do more than ask the offenders to leave. He would make an arrest. Under the Ordinance, the officer does not make any arrest unless his dispersal order is defied. The officer's own conduct initiates the crime; if his order is obeyed, by definition, no crime is committed. Thus the Ordinance operates in the absence of crime.

The City echoes this in its brief:

> "[the Ordinance] infringes on the 'liberty' to use the public ways only to a limited extent – even known gang members can loiter alone, and they can loiter with others as long as they move along when ordered. While the Illinois Supreme Court was troubled that the ordinance was not limited in its scope to persons loitering to engage in illegal activity, the mere potential for a prophylactic enactment to reach 'innocent' conduct does not give rise to a substantive due process violation" (Pet. Br., p. 12)

The utter absence of any criminality (or to phrase it in the affirmative, that the Ordinance is triggered by status) yields a plethora of constitutional problems:

a. The Notice Problem: The Ordinance hangs on the meaning of the term "loiter." But as the City admits, it is not loitering that is the target

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[4] Curiously, although the city counsel proclaimed that "members of criminal street gangs avoid arrest by committing no offense . . . when they know the police are present . . . " enforcement is limited by General Order 92-4 to tactical and gang crime officers, all of whom typically work in plainclothes and undercover, i.e., hiding their presence.

of the Ordinance, it is the presence of a gang member. Viewed from the perspective of the non-gang member/citizen, how can he ever determine, before the police interject themselves and direct him to surrender his place in the public way, that he is even in proximity to a gang member? This is an impossibility given that the police guard their internal files defining gang members – that is, the Ordinance is structurally incapable of affording citizens notice of what standard of conduct they must comply with;

b. The Vagueness Problem: Even if the Ordinance gave citizens the kind of notice this Court's decisions require, it still suffers from the defect of vesting such unbridled discretion in the police officer that the Ordinance means whatever any particular police officer, on any given day, thinks it means. What constitutes an "apparent purpose" such that the group is not loitering? How much information is necessary before a police officer can justifiably conclude that at least one member of that grouping is a gang member? What constitutes prompt dispersal? For example, if the police demand dispersal, and only the suspected gang member leaves, can the otherwise innocent citizens still be arrested for their failure to comply? The literal language of the Ordinance says yes – but this turns the Ordinance directly against its purpose, protecting the ability of the innocent to enjoy his or her own neighborhoods.

c. The Overbreadth Problem: The Ordinance casts a wide net, sweeping innocent conduct, and catching innocent citizens, in its web.

These points are addressed in more detail in ensuing sections of this Brief.

III. THE ORDINANCE IS AN UNCONSTITUTIONAL EXERCISE OF THE POLICE POWER IN THAT IT SEEKS TO PENALIZE INDIVIDUALS BASED UPON THE MERE PERCEPTION OF "GANG" STATUS, RATHER THAN BASED UPON ANY MISCONDUCT COMMITTED BY GANG MEMBERS, THUS RENDERING CITIZEN COMPLIANCE WITH ITS DICTATES VIRTUALLY IMPOSSIBLE.

As noted, the IACJ makes no brief favoring street gangs and their activities; their *criminal actions* are fitting subjects for application of the criminal law. The core problem with the Ordinance is that it is totally divorced from those activities – the Ordinance reads as if the Chicago City Council figuratively threw up its hands in frustration and declared that all associations that include a single gang member are illegal. While this determination may be founded on a real concern, its design is deeply offensive to our Constitution, and cannot withstand scrutiny.

A. The Concept Of Criminalizing Status, Independent Of Any Criminal Conduct, Has No Basis In American Criminal Law.

It scarcely requires citation to assert that criminal jurisprudence is conduct-driven: it seeks to punish what society regards as wrongful conduct, and in so doing deter such misconduct. But the criminal law does not punish mere thought, nor is "guilt by association" a recognized basis for the imposition of criminal sanctions. As this Court said in *United States v. Apfelbaum*, 445 U.S. 115, 131 (1980), "in the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur." This fundamental idea is so fundamental that, as the *Apfelbaum* Court noted, it has found expression in the works of Shakespeare, who wrote:

> "His acts did not o'ertake his bad intent;
> And must be buried but as an intent
> That perish'd by the way: thoughts are no subjects,
> Intents but merely thoughts."
> (Shakespeare, *Measure For Measure*, Act V, Scene 1).

In *Apfelbaum*, Your Honors noted that the Bard had expressed "sound legal doctrine" in this passage (445 U.S. 115, 131, n.13).

Similarly, no less a legal scholar than Justice Oliver Wendell Holmes observed in *The Common Law*:

> "It is not intended to deny that criminal liability, as well as civil, is founded on blameworthiness. Such a denial would shock the moral sense of any civilized community; or, to put it another way, a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear" (Holmes, Oliver Wendell, *The Common Law*, pp. 49-50; emphasis supplied).

The unifying fact in both *Apfelbaum* and Justice Holmes' formulation is that criminal statutes focus on conduct, not status.

The criminalizing of status has a failed history in our jurisprudence. A clear understanding comes from the juxtaposition of two cases, *Robinson v. California*, 370 U.S. 660 (1962), and *Powell v. Texas*, 392 U.S. 514 (1968). In *Robinson*, this Court addressed a California statute making it a crime simply to be a narcotics addict. Conviction did not require that the accused engage in any misconduct within California's jurisdiction (for example, he could have acquired his addiction elsewhere and then moved within the jurisdiction, and this Court was at pains to note that actual conduct, such as possession, use and sale of narcotic drugs were separately criminalized); the mere status of addict was sufficient to warrant the

imposition of a criminal sanction. This Court, after noting the many ways in which a State may legitimately address the abhorrence of drug usage and its consequences in society, characterized the statute as follows:

> "[t]his statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the 'status' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.' " (370 U.S. 660, 666).

Given that addiction could be innocently acquired (as in the case of pre-natal addiction from a mother's drug usage), this Court struck down the statute in a due process/cruel and unusual punishment analysis:

> "A state law which imprisons a person thus afflicted [that is, an addict] as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment" (370 U.S. 660, 667).

Phrased alternatively, this Court insisted that, constitutionally, the imposition of criminal sanction be linked to conduct, rather than hanging on mere status, despite the overwhelming societal need to address the scourge of drug addiction.

This requirement of some misconduct as a predicate to the imposition of any criminal sanction was hammered home in the succeeding *Powell* opinion. There, the accused sought safe harbor in the logic of *Robinson* by characterizing his alcoholism as a parallel disease to drug addiction, asserting that his conviction for public drunkenness could not stand consonant with *Robinson*'s holding. This Court distinguished *Robinson*, stating:

> "On its face the present case does not fall within that [*Robinson*] holding, since appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community. This seems a far cry from convicting one for being an addict, being a chronic alcoholic, being 'mentally ill, or a leper . . . ' " (392 U.S. 514, 532).

Notably, as this Court emphasized, the "status" of being drunk was linked with an *actus reus* – being in public while inebriated, and thus presenting a danger to one's self and others (for example, keeping drunks off the street while so impaired, a valid safety concern). Justice Black, writing for himself and Justice Harlan, went directly to this point in his concurrence, wherein he said:

> "Punishment for status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a mere propensity, a desire to commit an offense; the mental element is not simply one part of the crime but may constitute all of it. This is a situation universally sought to be avoided in our criminal law; the fundamental requirement that some action be proved is solidly established even for offenses most heavily based on propensity, such as attempt, conspiracy and recidivist crimes." (392 U.S. 51, 543).

Thus, *Powell* stands in sharp contrast to *Robinson*, for while the latter imposed sanction solely for status, the former did not. And lest anyone assert that there is a valid analogy to being "in public" while drunk and being in public while "a gang member," it bears mention that the accused inebriate need only sober up; under the Ordinance, one is a gang member until such time as the police, subjectively, determine otherwise. Moreover, the Ordinance applies to non-gang members with the same force.

In the Ordinance's formulation, wholly absent are any of the timeworn protections of citizens from even slightly intrusive police conduct: reasonable suspicion to warrant so-called "*Terry*-stops" (*Terry v. Ohio*, 392 U.S. 1 (1968)). Indeed, the Ordinance is designed to operate only where all such indicia warranting a police intrusion into a citizen's freedom are absent; obviously, if the police had facts supporting a *Terry*-stop or an arrest, they would pursue those options, rather than rely on the Ordinance to merely force people to move along. By design, the Ordinance is a tool allowing the police to disperse law-abiding citizens regardless of any criminal conduct. In the City of Chicago, where a former mayor once proclaimed "the police aren't here to create disorder; they're here to preserve disorder," placing this tool in the hands of the police comes freighted with significant weight.

Petitioners, naturally, dispute that the Ordinance is status-driven. In fact, the City has constructed an elegant legal ballet to disguise the role status plays in the Ordinance. The City posits a three-step process in police-citizen confrontations: first, the police officer, having probable cause to believe that at least one member of the gathering is a gang member, merely inquires into the reason for the gathering; second, the officer then determines if the gathering has any legitimate reason; and third, if there is no legitimate reason, he directs the gathering to disperse. It is only if this order is disobeyed that an arrest occurs (Pet. Br., p. 45). Distilled to its

essentials, the City's calculus asserts an anticipatory police role:

> "A collection of brazen, disorderly and visibly lawless persons on the public ways intimidates residents, detracts from property values, and ultimately destabilizes communities. The gang loitering ordinance and similar laws give the authorities a way to address this type of civil disorder. Such laws achieve an important prophylactic objective as well – because when police officers can order gang members to move along, they can prevent crime before it occurs." (Pet. Br., pp. 9-10).

This structure, of course, ignores a key reality: if the gang members are "disorderly and visibly lawless" they could be prosecuted for that conduct. The Ordinance operates only when the police lack evidence of such criminality, and thus its focus is purely one based on status, and association.

Accepting the City's formulation of the Ordinance does not answer the Ordinance's lack of constitutionality under the Fourth and Fourteenth Amendments, both failures arising from the basis for the initial confrontation. The Ordinance operates only where no crime has occurred, for if there was probable cause (or even a reasonable suspicion) the police could act under existing law. That all the police do is order dispersal thus lends the lie to the use of any probable cause determination, and establishes the status-driven nature of the Ordinance.[5]

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[5] Consider, for example, two hypothetical situations: the police confront a group in the Englewood section of Chicago, all of whom are simply sitting on park benches and chatting, and not committing any criminal act. The officer subjectively believes that probable cause exists to conclude one of the group is a gang member. Under the Ordinance, he may direct their

B. The Ordinance Also Fails To Provide Either Notice To Citizens Of The Conduct To Be Avoided Or The Police With Specific Guidance On The Proper Application Of Its Goals.

While not every contact between the police and citizens implicates Fourth Amendment values, the dispersal order does – the group, suspected gang members and innocents, are compelled to surrender their place in the broadly defined public way. Petitioner maintains that there is no Fourth Amendment "seizure" because all are free (indeed, compelled) to leave (Pet. Br., p. 47). This is a tortured view of the freedoms protected by the Fourth Amendment. One is only "free" where one's choices are not artificially constrained, and the Ordinance deprives all people of one of their two choices: the option of staying.

The Fourteenth Amendment problem also affirms the status-driven nature of the Ordinance. Petitioner's brief focuses substantial effort to the issue of loitering; in their analysis, the mere fact of loitering is sufficient to permit the initial intrusion of the police:

> "The court below, however, identified no history, tradition, or practice of respecting a right to loiter. In fact, history and tradition are quite to the contrary. The drafters of the Model Penal Code, for example, comprehensively traced the history of loitering laws before recommending one of their own, and observed that such laws have a considerable pedigree – they were first

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dispersal. In the second situation, the grouping and their actions are identical, except that no member is believed to be a gang member. The officer is powerless to direct their dispersal under the Ordinance. The distinguishing factor is pure status.

> enacted to help feudal lords control their serfs, later expanded as a means of controlling often dangerous bands of the unemployed, and ultimately were adopted in 49 states by statute and the remaining one by common law . . . The Model Penal Code itself recommends a prohibition on loitering under circumstances that reasonably warrant alarm for the safety of persons and property . . . " (Pet. Br., p. 41).

Several rejoinders to this reasoning are necessary.

> a. It is a curious argument which seeks to justify the Ordinance as the progeny of feudal tradition, or as a current mutation in this hemisphere of ancient British class warfare designed to hold the dispossessed, unemployed flotsam of the industrial revolution in check. It is surpassingly unlikely that either feudalism or the British experience during the industrial revolution were ever measured by a court of law applying the Fourteenth Amendment.
>
> b. Second, the argument ignores the fact that such laws have been tested under that amendment, and failed (*Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), which struck down a similar Jacksonville statute as offensive to due process of law).

The latter point warrants some expansion. In *Papachristou*, this Court struck a vagrancy ordinance (the functional equivalent of a loitering ordinance) as unconstitutionally vague, as it ensnared both the innocent and the guilty, leaving it to the courts to sort out the resulting detritus. Crucial was this Court's reliance on Justice Frankfurter's dissent in *Winters v. New York*, 333 U.S. 507 (1948), wherein he wrote:

> "These statutes are in a class by themselves, in view of the familiar abuses to which they are put . . . Definiteness is designedly avoided so as to allow the net to be cast large, to enable men

> to be caught who are vaguely undesirable in the eyes of the police and the prosecution, although not chargeable with any particular offense. In short, these "vagrancy statutes" and laws against "gangs" are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided." (quoted in *Papachristou* at 405 U.S. 156, 166).

This logic applies forcefully here. The flaw is two-fold: first, it affords citizens no clear standard to which they must conform their own conduct; and second, it vests such broad discretion in the hands of the police as to effectively make them super-legislators, defining what is criminal and what is innocent based on their own personal beliefs.

This Court has had many occasions to address similar statutory schemes. The general rule was succinctly stated in *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), where this Court stated:

> "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give men of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning."

The Ordinance bears a striking resemblance to the statute held unconstitutionally vague on this basis in *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). There, New Jersey sought to control the gangs of its day with these words:

> "Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or any other State, is declared to

> be a gangster . . . " (Sec. 4, R.S.N.J. 1937, 2:136-4, c. 155, Laws 1934).

In striking this statute, this Court condemned the loose language of the statute:

> "The state court did not find, and we cannot, that 'gang' has ever been limited in meaning to a group having purpose to commit any particular offense or class of crimes, or that it has not quite frequently been used in reference to groups of two or more persons not to be suspected of criminality or anything that is unlawful." (306 U.S. 451, 457).

This Court summarized by stating that a law which does not condemn any particular act or omission is too vague to survive due process analysis.

A similar analysis is found in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). There, a city law made criminal any gathering of three or more people in specified public areas who conducted themselves in a manner "annoying" to others; this Court held it unconstitutional on its face, as the term "annoying" was too vague to provide any standard of conduct other than whatever any particular police officer believed was annoying to him (402 U.S. 611, 614). This Court trenchantly noted that the fact that some conduct could be subjected to statutory control was insufficient to save the law:

> "It is said that the ordinance is broad enough to encompass many types of conduct within the city's constitutional authority to prohibit. And so, indeed, it is. The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited." (402 U.S. 611, 614).

This confirms the conduct-driven nature of penal statutes analyzed in the previous sub-section of this Brief, and also conforms to the notice and vagueness requirements underlying *Papachristou*, *Grayned*, and *Lanzetta*.

Viewed through this prism, the ordinance on its face begs many questions:

A. What does loitering mean? "Loiter," according to the city, means "to remain in any one place with no apparent purpose". On its face this definition of loitering means anyone not standing at a bus stop within sight of an approaching bus or elsewhere on the "public way" with a billboard slung over their shoulders announcing their purpose, could reasonably be believed to be loitering. The Ordinance leaves it to a police officer to determine whether someone's purpose in being in public is "apparent". As noted, such discretion, leaving enforcement to the predilections of the policemen on the street has routinely and appropriately been found unconstitutionally vague. *Smith v. Goguen*, 415 U.S. 566, 575, 94 S. Ct. 1242, 1248 (1974).

The Ordinance does not require the officer to conduct any reasonable investigation before making his dispersal order, nor does it require that the officer determine if there is some permissible, albeit not readily apparent, purpose. And what is meant by "disperse and remove themselves from the area". The plain meaning to the words in the Ordinance leads to the inescapable conclusion that it is impossible to comply with provisions of the Ordinance.

The city writes that the ordinance "is not directed at 'speech'; indeed, the ordinance applies whether or not loiters are speaking". Pet. Br., p. 19. One must ask then ask: if two or more people are speaking while standing in public is not their purpose apparent? Obviously, they are having a conversation. Unless conversation is somehow illegal in parts of Chicago, this very action should, logically, exclude them from the scope of the ordinance. Why then is the city telling this Court that these people, not

committing any apparent crime, merely having a conversation while standing on the sidewalk or in a park, fall within the scope of the Ordinance? Should a police officer have a right to approach these people and tell them they must move on? Why? What crime are they committing? What apparent crime are they committing? Indeed, what suspicious activity are they even engaged in?

B. What is required to "promptly obey"? There is no time standard defining the term. How quickly must one "promptly obey" the order to disperse? *Smith v. Goguen*, 415 U.S. 566 (1974).

C. The Ordinance is subjective in that it allows a police officer unfettered discretion to determine whether "he (the officer) reasonably believes [the individual] to be a criminal street gang member". Even though the General Order requires the maintenance of files identifying gang members, the sheer volume suggested by the city indicates that no police officer can ever truly know who is, or is not, a gang member. Human memory simply does not allow for the retention of such voluminous information. Since it is a subjective and not objective standard, such as those applied in evaluating probable cause for an arrest, it is impossible to have any meaningful review of the officer's decision. The subjective beliefs of an officer are never, standing alone, accepted by this Court to override objective constitutional standards. In *Stansbury v. California*, 511 U.S. 318, 324, 114 S. Ct. 1526 (1994) this Court noted that officers subjective beliefs that a person was a suspect was not relevant to an objective determination as to whether or not the suspect was in custody. Similarly, while an officer's subjective observations can be considered in determining probable cause, the standard remains an objective one.

Nor is the definition of gang member the only vagary contained in the Ordinance. The Ordinance defines "criminal street gang" as an ongoing organization, formal or informal, having as one of its substantial activities the

commission of enumerated offenses (Chi.Mun.Code, Sec. 8-4-015(c)(2)). As this Court may be aware, the Chicago Police Department itself has been the subject of intense investigation, and its members prosecuted, by the U.S. Attorney for offenses enumerated in the Ordinance (see, e.g., *United States v. Jackson*, 1998 U.S. Dist. Lexis 3602 (March 23, 1998) (involving a prosecution for racketeering, robbery, attempted robbery, extortion and other offenses relating to police corruption and narcotics trafficking in Chicago's Austin Police District)). The Ordinance's definition arguably renders the Chicago Police Department itself a criminal street gang! This fact makes former Chicago Police Superintendent Leroy Martin's words eerily prophetic and discordant: "When you talk about gangs, I've got the toughest gang in town: the Chicago Police Department" (*Chicago Tribune*, November 3, 1987).

Regardless of the criteria and/or standards the fact remains that membership in a gang is not a crime. No matter how specific the criteria, they will encompass people who have not engaged in any illegal activity, people who are wearing clothing for no significant reason other than they like it, copy cats, and innumerable others. Included amongst the color schemes identified in the general order are those that signify many different high school, college and professional sports teams, Batman, several countries and/or ethnic backgrounds, and others. While the city argues that the clothing definition is tempered by other requirements, it is the clothing that is initially visible and therefore more likely than not the impetus of the contact.

D. The Ordinance punishes the innocent. The Ordinance merely requires that the policeman reasonably believes one person in a group of two or more to be in a criminal street gang. Based upon that person's association or membership the Ordinance gives the police the power to control the activities of others lawfully upon the public way, others whom the police do not suspect of engaging

in any unlawful activity, being a member of any gang, and who otherwise, but for their "association" with the suspected individual, could loiter. It gives the police the power to clear ordinary citizens from the streets. This is a power that has never been authorized by this or any other court. It is a power utilized in military dictatorships and third world nations, emblematic not of the rule of law, but of its absence. It is no different than the power utilized by the Nazis to rid the streets of Germany of entire groups, or that are utilized in the modern world to suppress dissent.

While a nice academic constitutional analysis can provide some support for the Ordinance, this Court should look at the practical applications of this Ordinance and not just at the few individuals cited as respondent herein. The city suggests that there were "some 45,000 orders to disperse" issued and obeyed and a like number of arrests for orders disobeyed. It is difficult to imagine where the city compiled their statistics on orders obeyed since the officer on the street does not note orders obeyed in any manner. Rather, it is respectfully suggested by amici, who are a large group of practitioners, speaking daily with those individuals who are the objects of over reaching on the part of the Chicago police, that there were far more contacts with individuals on the street then the city suggests.

This City notes on page 16 of its brief that in 1995 gang related homicides in Chicago dropped 26 percent, and increased by seven percent the following year, after the Ordinance was invalidated. The city writes that this decrease can be simply explained because "if fewer gang members are loitering in public where they constitute an inviting target for their rivals, fewer of them – and innocent people nearby – will be shot to death". This is of course exactly the kind of hypothetical application that the city later condemns. (Pet. Br., p. 22). It also makes the absurd suggestion that someone who is alone is safer than in a group, or near others.

In telling this Court that gang related homicides dropped, the city fails to define "gang related". This statistical analysis is therefore as vague as the ordinance itself. Looking at the city's figures, one cannot determine whether gang related refers to victims, perpetrators, or both. What is undisputed is that homicides in Chicago have continued to decline since 1995, after the police stopped enforcing the Ordinance. The statistics compiled by the Chicago police department, found on the police WebSite, demonstrate that crime in the City of Chicago is dropping, and continues to drop, even after the ordinance was properly found to be unconstitutional. One need only look at 1998 statistics to dispense with the city's argument:

- in July, homicides were down 21 percent from a five-year average;
- in June, homicides were the lowest since 1988;
- in April, homicides were a ten-year low;
- in March, homicides were below the five-year average;
- in February, homicides were the second lowest since 1986; and
- in January, homicides were the lowest in a decade.[6]

Constitutional issues have never been determined based on an "end justifies the means" mentality. We do not dispense with basic constitutional principles because statistics support erosion of individual rights. Validation of this Ordinance is but the tip of the iceberg, and individual rights the Titanic. If this Court allows the iceberg to sink the ship, then individual rights have begun to descend to the level of a police state.

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[6] A detailed statistical breakdown for each year can be found on the police WebSite. Also included in the site are the police superintendent's annual remarks, attributing the drop in crime to tougher gun laws.

IV. THE ORDINANCE SUBSTANTIALLY INFRINGES ON THE RIGHT OF ASSOCIATION ENJOYED BY ALL ILLINOIS RESIDENTS

The First Amendment recites that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Consider this in the context of *De Jonge v. Oregon*, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1937), one of the suppression of communism cases from that period. Oregon had enacted a "criminal syndicalism" law that proscribed, essentially, combinations that advocated crime, physical violence, sabotage, or any unlawful means of accomplishing or effecting industrial or political change or revolution, an eerie parallel to the Ordinance's treatment of street gangs. On this, this Court wrote:

> "[The] right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. The First Amendment of the Federal Constitution expressly guarantees that right against abridgement by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions – principles which the Fourteenth Amendment embodies in the general terms of its due process clause.
>
> "These rights may be abused by using speech or press or assembly in order to incite violence and crime. The people through their Legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be

curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that the changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." (299 U.S. 353, 365)."

The case itself dealt with a communist party meeting; it was the mere fact that it was organized by that party which resulted in the charge of criminal syndicalism; in effect, being a communist or associating with communists is what was being penalized, based on the belief that communist beliefs were, *a fortiori*, antithetical to the democratic system, and thus within the police power to proscribe, based on a person's holding communist beliefs alone. This Court went on to state:

"The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting was held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their *conspiracy* or other *violation* of valid laws. But it is a different matter when the State, instead prosecuting them for such offenses, seizes upon mere participation in

a peaceable assembly and a lawful public discussion as the basis for a criminal charge." (299 U.S. 353, 365, emphasis supplied).

Comparison of that case to the facts here is revealing: no crime is allegedly committed (unless and until the dispersal order is ignored); it is the assembly itself that is criminalized. How can this be, consonant with the First Amendment?

Petitioner responds, with some potency, that the right of peaceable assembly and association does not exist in a vacuum:

"The final right that respondents have invoked, freedom of association, is not expressly protected by the Constitution. For this reason, the right to associate is protected only in two senses: when undertaken for the purpose of engaging in activities protected by the First Amendment . . . or when undertaken to engage in 'intimate human relationships' . . . " (Pet. Br., p. 20).

The fly in the ointment is the city's presumption that the First Amendment is the sole source of this right for due process purposes. Rights spring from various sources, including State enactments, which are enforceable under the due process clause.

Here, the answer is provided in the Illinois State Constitution, which recites:

"The people have the right to assemble in a peaceable manner, to consult for the common good, to make known their opinions to their representatives and to apply for redress of grievances." (Ill.Const. 1970, Art. I, Sec. 5).

Lest there be any confusion that this State-guaranteed right, like the Federal right, is conditioned on other rights, the Constitutional Commentary accompanying that provision is instructive:

"This provision is the same as Section 17 of Article II of the 1870 Constitution. A comma was

> inserted after 'manner' to assure that the right to assembly in a peaceful manner was an independent right, not subject to qualification by the succeeding phrases." (Smith-Hurd Illinois Compiled Statutes, Constitution, Art. I, Sec. 5, Constitutional Commentary).

Thus, even if the city is correct with regard to the First Amendment, the State's parallel right is equally enforceable in this Court. So analyzed, the Ordinance is still a substantial infringement on the rights of all, gang members and non-gang members, enforceable in this Court under the Fourteenth Amendment.

CONCLUSION

For all of the foregoing reasons the ruling of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1997

CITY OF CHICAGO,

Petitioner,

v.

JESUS MORALES, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF AMICUS CURIAE OF SEE FOREVER/THE MAYA ANGELOU PUBLIC CHARTER SCHOOL IN SUPPORT OF RESPONDENTS

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On Writ of Certiorari to the Supreme Court of Illinois

BRIEF AMICUS CURIAE OF SEE FOREVER/THE MAYA ANGELOU PUBLIC CHARTER SCHOOL IN SUPPORT OF RESPONDENTS

The City of Chicago's Gang Congregation Ordinance at issue in this case (Chicago Municipal Code § 8-4-015) authorizes a police officer under certain circumstances to order persons who are *not* gang members and are *not* believed to be gang members "to disperse and remove themselves from the area." *Id.* at § 8-4-15(a) (Pet. App. 61a).[1] This brief is submitted primarily to describe the effect of the Ordinance on the rights of innocent and well meaning persons, not engaged in any form of wrongful

[1] Written consent to the filing of this brief has been obtained from the parties. Copies of the consent letters accompany this brief. Pursuant to this Court's Rule 37.6, amicus states that this brief was not authored in whole or part by counsel for any party and that no person or entity, other than the amicus and its counsel, made any monetary contribution to the preparation or submission of this brief.

conduct, to use the streets and converse and associate with other persons who are behaving lawfully.

INTEREST OF THE AMICUS CURIAE

See Forever/The Maya Angelou Public Charter School ("See Forever") is a tax-exempt educational organization that provides a widely praised teaching and life-training program for "at risk" teenagers in the District of Columbia.[2] See Forever students attend a school with small classes, high academic standards, and innovative approaches to education. See Forever students also develop work skills by working at a student-run catering business and a student technology shop, and through internships at private businesses such as Fannie Mae, Borders Books & Music, Kinko's Copies, and the law firm of Steptoe & Johnson. See Forever also gives its students wrap-around support, including counseling, tutoring, and access to mental and physical health care. Finally, in addition to traditional school and work, See Forever promotes a variety of activities that encourage responsible behavior, good work habits, teamwork, trust, and nonviolent means of resolving differences. Students are generally engaged in See Forever activities 10 1/2 hours per day, from 9:30 AM to 8:00 PM.

See Forever's mission is to graduate educated and hard-working young adults who are guided by strong moral principles and committed to their families and their communities. As part of this commitment to community, See Forever students are encouraged to spend time on the streets as "student ambassadors" to their acquaintances. As ambassadors, they actively promote education, hard work, and self-discipline as alternatives to the gang life. They show their friends, some of whom may still be in gangs, that there is a better way. By doing so, they reinforce their

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[2] *See, e.g.*, Peter Slevin, *A New Way to See the Future*, WASH. POST, Mar. 23, 1998, at B1.

own commitment to their new lives, and they also provide the peer and community encouragement that, in See Forever's view, is the best hope of saving other youngsters from gangs.

A law like the Chicago Ordinance clashes, brutally, with everything See Forever is trying to accomplish. Most See Forever students live in neighborhoods similar to those that the Chicago Police Department has "designated" (*see* Pet. App. 68a) for enforcement of the Ordinance in that city. The Ordinance says to a teenager who lives in a "designated" neighborhood that however law-abiding he may be, his rights to move about and gather and converse have no value: the police control the neighborhood, and he can be ordered to disperse at a police officer's whim. And the Ordinance tells a teenager that however good his intentions, if he is speaking to a gang member he is doing something bad, no matter what he is saying. Where See Forever seeks to promote a sense of worth and community participation, the Ordinance gives up on the community and its residents and seeks to maintain order by sweeping the streets. And where See Forever believes that teenage "ambassadors" are among the best ways to convert gang members to a better life, the Ordinance replaces such efforts with "dispersement orders" and makes it more dangerous for well intentioned people to be on the street, where they face not only gang members but also the threat of fines and imprisonment.

SUMMARY OF ARGUMENT

This brief asks the Court to look at the Chicago Ordinance through the eyes of a teenager who is trying to build a good life but has the misfortune to live in a neighborhood "designated" by the police for enforcement of the Ordinance. It is almost impossible to overstate the impact of such a law on an inner-city teenager's everyday life, his efforts to engage in constructive activities with

peers, and his attitude toward society, the police, and the law. When See Forever students are not in school or engaged in other See Forever activities, they may well be lawfully standing on the corner, making conversation, or taking to friends: for students who often come from dysfunctional and virtually uninhabitable homes, there is no good alternative to the street corner. When a police officer "removes" such students, the officer denies them *any* place to stand and be themselves and engage in the routine activities of teenage life. Moreover, authorizing such removals makes it impossible for teenagers like See Forever students to act as "ambassadors" to eliminate gangs and gang violence at their roots: since teenagers socialize on street corners, See Forever students cannot reach their friends who are still gang members unless they can be on street corners, with friends, spreading the See Forever gospel. Finally, a law like the Ordinance sends the wrong message to young people who are struggling to leave the life of the gang and enter the life of established economic and legal structures. By giving individual police officers the discretion to clear the streets without identifying any criminal conduct, the Ordinance reinforces the existing sense that if you live in a "designated" neighborhood the law will assume you are up to no good.

This Court has held repeatedly that "[a]n individual, whom police . . . do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets" and cannot be barred from doing so "'at the whim of any police officer.'" *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), (quoting *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965)); *see Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). The Ordinance squarely violates that right, particularly with respect to law-abiding persons whose only pertinent characteristics are that (i) they are "with" a suspected gang member and (ii) their purpose is not "apparent" to a police officer. Our argument is in two parts.

First, the Ordinance, as construed by the Illinois Supreme Court, gives the police arbitrary and unchecked power to compel virtually any person in a "designated" neighborhood to "leave the area." This denies the commonplace but fundamental right to move about and speak with others so long as one is not doing or discussing or contemplating any wrong. A person in such a neighborhood who is confronted with such an order, backed by the threat of fine and imprisonment, has no alternative but to obey. No matter how unobjectionable, or even well meaning, such a person's conduct and intentions, he has no way of knowing whether his purposes are "apparent" to the officer, whether the officer has reason to believe someone else is a gang member, or whether he would be able to prove that all persons present are *not* gang members. A parent in such a neighborhood would surely advise her children to obey any dispersement order without question--and would be well advised to do so herself.

Second, this intrusion on the individual freedoms of law-abiding citizens is not justified by any law-enforcement purpose. Chicago already has (and any city could constitutionally adopt) laws that permit the police to deal with actual wrongdoing, including loitering with intent to obstruct or intimidate other persons. Such laws can also reach bystanders whose presence knowingly or recklessly interferes with police officers doing their jobs. As Illinois courts at all levels concluded, there was no need to authorize the police and prosecutors to bypass all proof of either wrongful action or wrongful intent and simply sweep the streets.

ARGUMENT

THE CHICAGO ORDINANCE UNCONSTITUTIONALLY RESTRICTS THE RIGHTS OF ORDINARY CITIZENS, WHO ARE NOT ENGAGED IN OR PLANNING OR ABETTING ANY UNLAWFUL ACTIVITY, TO USE THE STREETS, ASSEMBLE, AND SPEAK WITH OTHER PERSONS

This case is about a serious intrusion on the rights of law-abiding people who live in a "designated" neighborhood to engage freely in the ordinary activities of life. Petitioner's argument (Br. 39-44)[3] that the Chicago Ordinance does not affect fundamental rights is startlingly wrong: No American with the resources to live outside of a "designated" area would tolerate a regime in which he or she could be ordered to "disperse" from a neighborhood street, on threat of fine and imprisonment, solely because (i) his or her purpose is not "apparent" to a police officer and (ii) the officer claims reason to believe that someone *else* in the area is a gang member. The First Amendment and the Due Process Clause of the Fourteenth Amendment protect more than the right to make political speeches: they protect the right to stand and move about on the streets of one's own neighborhood for the ordinary purposes of life. The Constitution protects the right to gather with acquaintances or strangers, the right to engage in ordinary conversation in public places, and the right to attempt to persuade others to one's point of view. Such rights are fundamental to any free society, as this Court has stated repeatedly.[4]

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[3] *See also, e.g.*, Brief Amicus Curiae of United States 22-29; Brief Amici Curiae of Chicago Neighborhood Orgs. 25-29; Brief Amici Curiae of U.S. Conference of Mayors, *et al.* 10-18; Brief Amicus Curiae of Washington Legal Foundation, *et al.* 9-19.

[4] *See Kolender*, 461 U.S. at 358 (loitering ordinance jeopardizes (continued...)

The Ordinance violates these basic liberties. As we show in Part A below, it gives the police arbitrary power to sweep the streets of persons whose actions and intentions are lawful and proper. And as we show in Part B, the Ordinance is not necessary to deal with improper actions, such as loitering for improper purposes and interfering with other residents or the police, because all such actions can be prohibited by properly drafted laws, including ordinances already on Chicago's books. Difficulties of proof do not justify "dispersement" of persons who have not done or intended any wrong.

A. The Chicago Ordinance Interferes with Fundamental Rights by Giving the Police Arbitrary Power To "Sweep . . . the City's Streets"

"Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty." *Kolender*, 461 U.S. at 357. Under the Chicago Ordinance, "individual freedoms" and "liberty"--including the freedoms of persons as to whom there is not even a suspicion of wrongdoing--are wholly subordinated to "order."

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[4] (...continued)
"constitutional right to freedom of movement" and creates "'potential for arbitrarily suppressing First Amendment liberties'") (quoting *Shuttlesworth*, 382 U.S. at 91); *Papachristou*, 405 U.S. at 163, 164 (city cannot "make[] criminal activities which by modern standards are normally innocent"; wandering and strolling are protected "part of the amenities of life as we have known them"); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 96 (1965) ("Failure to obey [dispersement] order, when one is not acting unlawfully, certainly cannot be made a crime in a country where freedom of locomotion . . . is honored.") (citation omitted); *Williams v. Fears*, 179 U.S. 270, 274 (1900) ("[u]ndoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty").

The Supreme Court of Illinois--whose construction of the Ordinance is of course binding, *e.g.*, *Kolender*, 461 U.S. at 355--held that the Ordinance is not subject to any limiting construction because its clear and unambiguous intent is to give the police arbitrary power to sweep the streets:

> [T]he gang loitering ordinance is not reasonably susceptible to a limiting construction which would affirm its validity. Although the proscriptions of the ordinance are vague, the city council's intent in its enactment is clear and unambiguous. The city has declared gang members a public menace and determined that gang members are too adept at avoiding arrest for all the other crimes they commit. Accordingly, the city council crafted an exceptionally broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets.

(Pet. App. 16a.)

The sweep is not limited to suspected gang members. A police officer may order any other person who is "with" (term undefined) a suspected gang member to "disperse and remove [himself] from the area," on pain of fine and imprisonment, without any grounds for believing that *any* person present (including the gang member) has committed, is engaged in, or intends any wrongful act. (Pet. App. 61a, 63a.)

This Court held in *Kolender* that such standardless sweeps, under threat of criminal penalties, are impermissible:

> [T]he more important aspect of the vagueness doctrine "is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement." Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep . . . ."

> . . . [The statute at issue is facially invalid because] [a]n individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets "only at the whim of any police officer . . . ."

461 U.S. at 358 (citations omitted).

The focus of *Kolender* was not solely on the arbitrariness of the resulting *prosecution*, and (contrary to petitioner's argument, Br. 29, 34-35) the problem *Kolender* identified is not solved merely because the police officer's order to "disperse" is itself presumably unambiguous. *Kolender*, like this case, was concerned with the fundamental right to be on the street unless there are grounds for a contrary order. Indeed, this case is, in an important sense, *a fortiori* to *Kolender*: In that case, the statute required, and the Court assumed the officers had identified, "circumstances that would justify a stop under the standards of *Terry v. Ohio*, 392 U.S. 1 (1968)." 461 U.S. at 353. The Chicago Ordinance does not require any circumstance that would justify even a *Terry*-stop even of the suspected gang member, let alone of other persons present.

We ask the Court to consider the effect of the Ordinance on a law-abiding teenager who lives in a "designated" neighborhood. For a See Forever student, such a law would mean forfeiting one of the most basic rights of life in a democratic society: the right to stand in a public place and speak with friends. Many See Forever students and similar inner-city teenagers have nowhere to socialize except on the streets. Many come from dysfunctional and virtually uninhabitable homes. Many have parents who have abused drugs and alcohol, and many have been abused by their parents. Many live in small apartments, teeming with children, where air conditioning is rare and roaches and rats are common. Many do not have telephones to call their friends. And unlike many suburban teenagers, See

Forever students cannot escape with their friends to the den, the family's back yard, or the mall. For these students, the street corner is the only place to relax and socialize. Yet it is no exaggeration to say that under the Ordinance a teenager in a "designated" neighborhood faces the prospect of a command to "disperse" every time he or she ventures out into the neighborhood for anything other than a solo errand that remains strictly solo--and that the teenager *must* obey every such order promptly or face a fine or imprisonment. If the Ordinance is constitutional, any group gathering in such a neighborhood can be dispersed at a police officer's whim.

1. To begin with, on its face, the Ordinance does not require that *any* person in the street gathering be engaged in, or discussing, or even contemplating any unlawful or improper activity. On the contrary, the Ordinance itself recites an extraordinary premise: the police must be given dispersement power because gang members "avoid arrest by committing no offense punishable under existing laws when they know the police are present." (Pet. App. 60a.)

Although the Ordinance states (*id.*) that it is aimed at activity that intimidates other persons and thus maintains gang control of a neighborhood, the Ordinance does not require proof, or even grounds for suspicion, that *any* person in the gathering is intimidating another person, or has an intent to intimidate or otherwise interfere with the passage or activities of any other person. Similarly, while the Ordinance asserts that gang members "create[] a justifiable fear for the safety of persons and property" (*id.*), it does not require any proof or grounds for suspicion that any person present is engaging in activities warranting alarm.[5]

[5] *Cf. State v. Ecker*, 311 So. 2d 104 (Fla. 1975) (upholding statute barring loitering in an unusual manner under circumstances that warrant alarm).

A law-abiding and well intentioned teenager, confronted with an order to disperse, cannot respond, "I'm not doing, talking about, or even thinking about, doing anything wrong, and as far as I know no one else is either," because under the Ordinance all of that is irrelevant to an order to disperse, and a violation of the order can lead to fine or imprisonment.

2. Petitioner (Br. 30-31) and its amici (*e.g.*, U.S. Br. 12-15) argue that the word "loiter" somehow limits the power of a police officer to issue a dispersement order, but as the Illinois courts explained, the term imposes no useful limitation. "Loiter" is defined in the Chicago Ordinance to mean "to remain in any one place with no apparent purpose." (Pet. App. 61a.) Although the Ordinance does not say so explicitly, it appears that the person to whom such a purpose must be "apparent" is the officer who issues the dispersement order. But many if not most people who are on any street at any given time are there for a purpose that is not "apparent" to any police officer. Teenagers linger in upscale suburban shopping malls as well as the mean streets of Chicago's "designated" neighborhoods, and in neither case is their purpose generally apparent to any adult. Strollers, gossipers, people on their way somewhere who have stopped to rest, people escaping the heat, people who are planning a political parade, and innumerable others who are engaged in lawful and constitutionally protected activities generally will not--and certainly are not required to--make their purposes "apparent" to strangers including police officers.[6]

[6] The Supreme Court of Illinois explained: "a person waiting to hail a taxi, resting on a corner during a jog, or stepping into a doorway to evade a rain shower has a perfectly legitimate purpose in all these scenarios; however, that purpose will rarely be apparent to an observer." (Pet. App. at 10a.) The Appellate Court of Illinois offered as further examples of everyday activities with no "apparent" purpose, "someone waiting with a friend or a family member for a ride to the

(continued...)

Moreover, the fact that a person *does* have a proper purpose is not a defense to a dispersement order or prosecution under the Ordinance. In fact, a person's actual purpose does not matter at all. Under the Ordinance, if a police officer orders a teenager to disperse and the teenager fails to do so, he or she is punishable by fine and imprisonment for disobeying the order. Whether the teenager was discussing a social event, running an errand for a parent, heading for a political rally, chatting with friends or relatives, or trying (as See Forever students do) to persuade acquaintances to turn to a better life is irrelevant. All that matters is whether the person's purpose was "apparent" to the officer.

Conversely, if citizens possess an "apparent" noncriminal purpose, the Ordinance gives the police no power to order dispersement, regardless of their actual purpose. The district court offered the example of teenagers playing basketball while waiting for a drug delivery. (Pet. App. 48a-49a.) Petitioner adds a remarkable example: "Under the ordinance, gang members remain free to protest, picket, solicit contributions for their gangs [!], conduct a leafleting campaign, or engage in any other of the innumerable types of expressive conduct that has an 'apparent purpose.'" (Br. 27.) In other words, it appears that actual gang members could immunize themselves against a dispersement order by carrying signs saying "Re-elect Mayor Daley" or "Support the Vice Lords."

In sum, a teenager who is on the street for virtually any actual purpose can, as long as the purpose is not inescapably apparent, be characterized as loitering, and the Ordinance provides no defense to protect those with

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[6] (...continued)
grocery store, or someone waiting outside the laundromat for their cloth[e]s to dry [or] . . . two friends who see each other on the street and stop to talk." (Pet. App. 27a.)

legitimate and constitutionally protected purposes from being forced to disperse, fined, or imprisoned.

3. The only other requirement of the Ordinance, the presence of at least one person whom the police officer "reasonably believes" to be a gang member, also affords an innocent and well meaning teenager no defense whatsoever to a dispersement order backed by the threat of a criminal charge.

First, the teenager need not herself be a gang member, or be suspected of gang membership, to be subject to an order to disperse. Moreover, the teenager need not know or suspect that a gang member is present, and the police officer need not give reasons. If a police officer says, in a "designated" neighborhood, "I believe a gang member is present so you all must disperse," a law-abiding teenager resists that order strictly at his or her own peril.

Second, the Ordinance does not state that a person accused of disobeying a dispersement order can defend on the ground that the police officer's belief that a gang member was present was not reasonable. (On the contrary, the only defense set forth in the Ordinance is an "affirmative" showing that no person present was in fact a gang member.) But even if reasonableness in fact were a requirement of the offense, a teenager confronted with a dispersement order has no way of knowing whether the police officer has reasonable grounds and, again, can resist the order only at his or her peril.[7]

Third, the "affirmative defense" (Chicago Municipal Code § 8-4-015(b)) that "no person who was observed

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[7] Amicus assumes that police officers will ordinarily act in good faith. But the Ordinance requires no advance or third-party review of the police officer's grounds for believing a person to be a gang member. On the contrary, if reasonableness were ever an issue in a subsequent prosecution, the police officer could defend his or her actions with the benefit of hindsight.

loitering was in fact a member of a criminal street gang" has no practical significance to a teenager who is trying to determine how to behave on the streets. (Pet. App. 61a.) An innocent and well meaning teenager confronted with a dispersement order may believe that no gang members are present but will often have no way to be certain, particularly in a group of any size in a "designated" neighborhood. And he or she will almost certainly be unable to bear the apparently "affirmative" burden of proving that no gang members were present.[8] Among other things, "gang" is defined to include an "informal" association and "member" is not defined at all. In light of this considerable ambiguity, a teenager confronted with a dispersement order will have no confidence that he will have the resources to find each person who was present and prove non-gang membership.

Finally, there is no deterrent to an officer's overly aggressive, careless, or simply incorrect belief that some person in a street gathering is a gang member. On the contrary, the officer's principal purpose, in virtually every case, will be to break up the gathering. Armed with the threat of fine or imprisonment, the officer will always succeed, because no law-abiding person will be confident of any defense against a charge of refusal to obey. If it later appears that no gang member was present in fact, the individual prosecution will fail, but the underlying purpose--sweeping streets--will have been achieved at no cost to the police force. The cost will be borne by

[8] The Ordinance implies that the defendant would have the burden of proving this negative. Neither petitioner nor the Illinois courts have suggested otherwise. Accordingly, amicus will not discuss whether this assignment of the burden of proof constitutes an additional ground for declaring the Ordinance unconstitutional (*cf. Patterson v. New York*, 432 U.S. 197, 210 (1977) (discussing constitutional limits on when government may "reallocate burdens of proof by labeling as affirmative defenses" elements of a crime)) or whether the Ordinance can be construed to avoid this difficulty.

law-abiding persons who have been disrupted in the conduct of their ordinary lives--and who will be disrupted again and again. Indeed, inappropriate enforcement of the Ordinance may seldom even come to light, because law-abiding citizens will disperse, sparing the police the burden of explaining their actions in court.[9]

4. Even in cases where at least one gang member is known to be present, the Ordinance conflicts with fundamental rights of others whose presence is law-abiding or even well meaning. It is not unlawful to stand near a felon when the felon's not engaged in his employment. And one may talk to a felon if the talk is benign. Indeed, the Ordinance does not purport to make such conduct unlawful. Instead, the Ordinance empowers the police to order this lawful conduct to stop, and to prosecute those who defy the order. If the felon--the gang member--"moves on" and the law-abiding teenager remains, only the latter can be prosecuted.

The Circuit Court of Cook County posed a hypothetical example it found very troubling. It is an example at the heart of the particular concern of amicus. The court asked petitioner during oral argument:

> [W]hat would occur . . . if an officer observed a "known" gang member . . . talking with three members of the Northwest Community Federation. The hypothetical assumed that the three . . . were trying to talk the gang member into leaving the gang. The City responded that the officer would approach the four

[9] *See generally* John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 216 (1985) ("where there is an identifiable victim (who is likely to keep track of police action), or where the crime is very serious (and thus likely to attract public monitoring of prosecutorial decisions), the risk of abusive enforcement is reduced").

> individuals and order them to leave. If his order was disobeyed, all four would be arrested.

(Pet. App. 57a.) In this hypothetical, no one is engaging in any criminal act, and (the court stipulated) "[n]o criminal intent existed, no danger to the community was imminent, and nobody's path was blocked." *Id.* Moreover, although the three Federation members did not have any purpose "apparent" to the hypothetical police officer, their actual purpose was, as the court pointed out, not only "lawful" but "positive." *Id.* Yet they were subject to arrest and, ironically, would have been subject to arrest and prosecution even if the gang member had obeyed and dispersed.

The City's response to the court's hypothetical makes it clear that the Ordinance would chill exactly the kind of constitutionally protected activity--speaking to others and encouraging them to leave street gangs--that See Forever students regularly engage in. See Forever students are encouraged to speak to friends about the new lives they have begun for two reasons. First, See Forever believes--and it is not a new or controversial idea--that one of the best ways to help its students toward proud and productive lives is to teach them to help others. See Forever students are taught that individual responsibility is the foundation of a good life and that they must take responsibility for what they have done and should encourage others that no matter what mistakes they have made, they too can turn their lives around. Second, See Forever believes that its students can best contribute to the fight against street gangs and criminality by counseling and cajoling others toward a better life. The street corners are the only place where See Forever students can reach these teenagers, because the most "at risk" teenagers do not go to church, school, or community meetings.

Nor is it sufficient to say that student ambassadors could set up information booths or pass out flyers. See Forever

students are effective because they can communicate naturally to their gang-involved acquaintances their excitement over their new lives. A See Forever student plants the seeds by telling his acquaintance what he did that day: "I got an 'A' on my paper about Duke Ellington." "I helped program a computer at Fannie Mae." "I filled out a college application." Or the student tells how his school feels: "The classes are small. The teachers really care. It's like a family." The conversion process begins when the acquaintance sees the excitement in the See Forever student's eyes and compares it to his own dead-end life and begins to think that he is just as good as the See Forever student and he can do it too. This kind of important--and constitutionally protected--speech would be eliminated by an Ordinance that sweeps the streets.

The Ordinance runs counter to the message that See Forever believes is essential to defeating the gangs and their influence. See Forever teaches its own students and other "at risk" teenagers that society rewards responsibility, work, and compliance with law. See Forever's message is that society respects good citizens even if they come from bad neighborhoods. That message can be hard to sell in communities that often feel victimized by overzealous law enforcement and believe that the legal system discriminates against poor people and minorities. Nonetheless, See Forever is succeeding in some of the District of Columbia's toughest neighborhoods and with some of its most "at risk" teenagers. The Ordinance, by contrast, criminalizes ordinary and law-abiding behavior; it subjects the well meaning citizen to the same sweep of the streets as the gang member. It reinforces the belief that if you come from a bad ("designated") neighborhood you are specially subject to arbitrary police orders. And it tells "at risk" teenagers that no matter how hard they work to become part of mainstream society, than are no different in the eyes of the law than before they changed their lives.

In sum, the Ordinance gives the police the power to issue dispersement orders that law-abiding persons, engaging in wholly benign activities, can resist only at the distinct peril of a successful prosecution. It thus interferes with ordinary daily activities and constitutionally protected activities in a way that almost everyone not forced to live in a "designated" area would find intolerable. Petitioner acknowledges (Br. 38) that this is "strong medicine" but says the disease requires it. But the medicine, even apart from its side effects, is far stronger than is appropriate to the disease. As the Illinois Supreme Court concluded and we show below, the objective can be achieved with laws far less restrictive of the rights of law-abiding and well meaning people.

B. The City of Chicago Has Adequate Means of Dealing with Gangs without Abridging the Rights of Law-Abiding and Well Meaning Persons

The Ordinance authorizes a police officer to sweep all people from an area whenever the officer sees any individual he reasonably believes to be a member of a gang. The purported justification for this power is the need to prevent "intimidati[on]" through which "criminal street gangs establish control over identifiable areas" and to preempt crimes that the police are unable to observe or to prosecute. (*See* Pet. App. 60a (Ordinance); Pet. Br. 3-4.) But the law's purposes can be achieved by enforcing statutes and ordinances that deter and punish actual, concretely threatened, and intended misconduct. There is no need for preemptive sweeps, and "this is not a case where further precision in the statutory language is either impossible or impractical." *Kolender*, 461 U.S. at 361.

The City of Chicago *may* outlaw loitering with any illicit purpose, including intimidation.[10] Indeed, the City

[10] *See* Pet. App. 10a-11a (citing *State ex rel. Williams v. City Court*, (continued...)

may criminalize the very activity described in the recitals to the Ordinance--*i.e.* "establish[ing] control over identifiable areas [] by loitering in those areas and intimidating others from entering those areas." (Pet. App. 60a.) The City obviously may also prohibit loitering for the purpose of acting as a lookout for gang members or other persons engaged in or planning a crime.

In fact, as the Illinois Supreme Court pointed out, the state and city already have powerful laws against "intimidation" and related evils.[11] Chicago's Deputy Police Superintendent estimated to the City Council that existing laws cover ninety percent of the situations about which other witnesses had complained.[12] Incidentally, it is not at

[10] (...continued)
520 P.2d 1166, 1168 (Ariz. Ct. App. 1974) (loitering for purpose of begging); *People v. Superior Court*, 758 P.2d 1046 (Cal. 1988) (loitering to solicit lewd or unlawful act); *State v. Ecker*, 311 So. 2d 104 (Fla. 1975) (loitering in an unusual manner under circumstances that warrant alarm); and *State v. Armstrong*, 162 N.W.2d 357 (Minn. 1968) (loitering with intent to solicit prostitution)).

[11] *See* Pet. App. 19a ("The city is not helpless in its war against the criminal activity of gangs. Many of the offensive activities the city claims the gang loitering ordinance will deter are already criminal acts. *See, e.g.*, 720 ILCS 5/12-6 (West 1996) (intimidation); 720 ILCS 5/12-6.1 (West 1996) (compelling organization membership of persons); 720 ILCS 5/12-6.2 (West 1996) (aggravated intimidation-a gang member committing the offense of intimidation for the purpose of furthering gang activities); 720 ILCS 5/25-1 (West 1996) (mob action).").

[12] Supp. R. II. at 181-82 (testimony of Deputy Superintendent Gerald Cooper) (answering question "[a]re there already laws and it's just a question of enforcement?," by stating: "I think there are already laws. I think there are already enough laws on the books at thispoint, criminal laws, criminal penalties which are much different than the ones that are articulated in the ordinance. But certainly, there [are] always going to be situations where there is no specific violation . . . but for the most part and in the examples that people have been giving . . . I would think (continued...)

all clear that the Ordinance has improved law enforcement; some reported statistical data show that gang-related killing in Chicago climbed while the loitering ordinance was in force.[13]

Moreover, the city *may* authorize the police to order even innocent and well meaning persons to leave the scene of actual misconduct. It may prosecute persons who refuse to obey such an order.[14] For example, if a police officer sees that at a particular place some individuals (whether gang members or not) are intimidating others, or loitering

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[12] (...continued)
that 90 percent of those instances are actually criminal offenses where people, in fact, can be arrested.").

Boston has reportedly succeeded in reducing gang violence, without loitering or curfew laws, through a combination of community programs like See Forever and aggressive police work against actual crimes. *See, e.g.*, Steven A. Drizin, *Anti-Loitering Laws Don't Prevent Shootings*, CHI. DAILY L. BULL., July 8, 1998, at 6 (describing how "Boston's reduction in gang violence was achieved without relying on curfews, anti-loitering ordinances and other such laws," but rather on aggressive traditional enforcement tactics coupled with prevention programs).

[13] *See Morning Edition* (NPR radio broadcast, Apr. 22, 1998) (*available in* 1998 WL 3307123) ("[C]ity officials like to boast that gang-related killings dropped while the law was in force. The city's homicide figures show otherwise. Gang deaths increased every year the law was in effect, except one. And that drop came a year after the number of gang-related homicides had doubled.").

[14] *See Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) ("When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious."); *see, e.g., City of Portland v. Hemstreet*, 850 P.2d 1131, 1133 (Or. Ct. App. 1993) (upholding statute allowing police to disperse entire crowd if two or more people present "'[a]re threatening bodily harm to another or damage to property, with immediate power to carry out that threat'") (quoting Portland City Code § 14.24.100).

with intent to intimidate, the officer may both arrest the persons so engaged and also order others away from the scene if their mere presence assists the perpetrators and interferes with legitimate police procedures.

Colten v. Kentucky, 407 U.S. 104 (1972), illustrates the proper way to authorize dispersement of persons whose mere presence interferes with the police or aids wrongdoers. *Colten* involved a statute that prohibited, as "disorderly conduct," the act of "[c]ongregat[ing] with other persons in a public place and refus[ing] to comply with a lawful order of the police to disperse" *if* the defendant has an "intent to cause public inconvenience, annoyance or alarm, or [is] recklessly creating a risk thereof." 407 U.S. at 108. The Court affirmed the conviction of a defendant who persisted, after being ordered to leave, in attempting to intervene in a friend's traffic arrest. *Id.* at 109. The Court said the defendant:

> had no constitutional right to observe the issuance of a traffic ticket or to engage the issuing officer in conversation at that time. The State has a legitimate interest in enforcing its traffic laws and its officers were entitled to enforce them free from possible interference or interruption from bystanders.

Id. Chicago could deal properly with the problem of bystanders by adopting (if it does not already have) a disorderly conduct ordinance similar to the one approved in *Colten*.

But rather than rely on vigorous enforcement of existing laws, or enact proper new laws (if needed) to bar intimidation and interference with proper police procedures, Chicago has authorized a preemptive street sweep. Under the Ordinance, the City need not prove any act of intimidation or obstruction, or any intent to intimidate or obstruct, or indeed any wrongdoing or wrongful intent of any kind by anyone. It is, of course, *easier* to sweep the street of every person in the vicinity of a suspected gang

member than to prove any actual misconduct or wrongful intent. But acts of intimidation and obstruction can be observed and testified to, and intent to intimidate or obstruct are also provable by standard methods. As the Illinois Supreme Court said, "The city is not helpless in its war against the criminal activity of gangs." (Pet. App. 19a.) The Constitution does not permit the government to curtail the liberties of law-abiding and well intentioned citizens in order to avoid the work of identifying and prosecuting the guilty.

CONCLUSION

The Court should affirm the decision of the Supreme Court of Illinois.

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In The

Supreme Court of the United States

October Term, 1997

CITY OF CHICAGO,

Petitioner,

vs.

JESUS MORALES, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF CHICAGO ALLIANCE FOR NEIGHBORHOOD SAFETY, U.S. REPRESENTATIVE JESSE JACKSON, JR., COMMUNITY RENEWAL SOCIETY, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NATIONAL COUNCIL OF LA RAZA, MEXICAN-AMERICAN LEGAL DEFENSE FUND, CHICAGO COUNCIL OF LAWYERS, COOK COUNTY BAR ASSOCIATION, PUERTO RICAN BAR ASSOCIATION OF ILLINOIS, THE BLACK LEADERSHIP FORUM, INC., CHICAGO CONFERENCE OF BLACK LAWYERS AND CHICAGO COMMUNITY ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

(1) Whether ordinance against loitering "with no apparent purpose" is impermissibly vague on its face, when state supreme court has determined that City Council's legislative intent precludes a judicial construction narrowing or clarifying the law's terms.

(2) Whether ordinance requiring citizens to comply with a police officer's order to "disperse and remove themselves from the area" is impermissibly vague on its face, when neither the ordinance nor any implementing guidelines indicate the extent of the "area" that the citizen must leave or how long the citizen must remain away in order to avoid arrest.

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INTEREST OF AMICI CURIAE[1]

Amici are grass-roots membership groups, and other Chicago and national organizations dedicated to serving the needs of inner-city residents. *Amici*'s members live with the reality of gang violence and understand the need for thoughtful police initiatives, as well as the dangers to public safety and civil liberties that can result from insufficiently careful responses to public frustration, impatience and understandable demands for law and order.

The Chicago Alliance for Neighborhood Safety (CANS) has been one of the leading community organizations working to implement community policing at the grass-roots level, in direct partnership with the Chicago Police Department (CPD). CANS "worked for years to encourage the adoption of community policing in Chicago,"[2] and has played a major role in community policing initiatives, often under contract with the City and the U.S. Department of Justice.[3] CANS does not lightly disagree publicly with the City and the CPD, but CANS believes it essential to advise this Court of its view that the gang loitering ordinance is unconstitutional, divisive of communities along racial and generational lines, destructive of genuine community policing and ultimately likely to make Chicago neighborhoods less safe.[4]

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1. Pursuant to this Court's Rule 37.2(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members or their counsel made a monetary contribution to the preparation or submission of this brief.

2. Chicago Community Policing Evaluation Consortium, Wesley Skogan, *et al.*, eds., Community Policing in Chicago, Year Three, Nov. 1996, p. 32.

3. CANS proposals in the gang area have included the 6th District Anti-Gang Initiative, "an intensive problem-solving partnership between the CPD and the Chicago Alliance for Neighborhood Safety, funded by the US Department of Justice." *Id.*, Year Four, Nov. 1997, p. 145.

4. CANS' board of directors includes representatives from Chicago's major neighborhood-safety organizations. All but one of these representatives

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Rep. Jesse Jackson, Jr. is a Member of the U.S. House of Representatives, representing Illinois' 2nd District.

Community Renewal Society, founded in 1883, is a metropolitan Chicago faith-based organization, affiliated with the United Church of Christ, that works with churches and other community organizations to achieve economic and racial justice through programs that rebuild communities from within.

The National Association for the Advancement of Co!ored People, Inc. is the oldest and largest civil rights organization in the United States with a membership of over 500,000 and a network of more than 2,200 branches covering all 50 states and the District of Columbia. In addition to the national office, the NAACP's Illinois State Conference, the State umbrella organization of local chapters, and the Chicago Southside, the Chicago Westside and the Evanston/ Northshore branches support the Responsents as *amicus curiae.* The Black Leadership Forum, Inc. is a confederation of national civil rights and service organizations designed to promote creative leadership on civil rights and major public policy issues of significance to African-Americans. The National Council of La Raza represents more than 200 community-based organizations dedicated to reducing poverty and discrimination for Americans of Hispanic descent; its affiliates provide social services for more than two million persons throughout the United States each year. The Mexican-American Legal Defense Fund is a national nonprofit organization whose mission is to protect the civil rights of the more than 28 million Latinos living in the United States.

The Chicago Council of Lawyers is a public interest bar association, composed of approximately 1,200 lawyers, that has long been concerned with the fair and equal administration of justice. The Cook County Bar Association, the oldest bar association of lawyers of African-American heritage in the United States, has been delivering legal services to the black community since 1919. The Puerto Rican Bar Association of Illinois consists primarily of attorneys of Puerto Rican and Hispanic descent, committed to serving the legal needs of

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voted to join respondents in opposing the loitering ordinance in this Court; the Northwest Neighborhood Federation dissented.

the Hispanic community. The Chicago Conference of Black Lawyers works directly with community organizers dedicated to protecting the rights of black people in the Chicago area.

The groups listed in the margin, identified collectively as the Chicago Community Organizations, are likewise engaged directly in the effort to afford Chicago residents equal justice and safety from gangs and violence. They share in the conviction that the anti-loitering ordinance is an ill-considered, counterproductive and unconstitutional response to Chicago's serious problems of gang activity and violence.[5]

STATEMENT OF THE CASE

1. Chicago's citizens are united in their determination to combat gangs. Yet the means at issue in this case, the city's anti-loitering ordinance, has evoked substantial community opposition. The ordinance applies to any group of two or more individuals who gather "with no apparent purpose" in any public place, including streets, parks, restaurants, and any other location open to the public. Pet. App. 63a. The ordinance mandates that if a police officer reasonably believes any of the individuals to be a gang member, he shall order all of the individuals, including those not suspected of gang membership, to "disperse and remove themselves from the area"; the officer may then arrest any individual he believes to be disobeying the order. Pet. App. 61a.

City Council consideration of the ordinance was marked by intense disagreement. The *Chicago Tribune* described the proceedings as "one of the most heated and emotional council debates in recent memory."[6] Concern focused on the fact that the ordinance permits the arrest of those not suspected of gang involvement; that it could be

5. The groups are Centro Sin Fronteras and the Sin Fronteras Law Program of Chicago's West Town Neighborhood, the Chicago Coalition for the Homeless, Citizens Alert (police accountability organization), the Community Action Group of North Lawndale, the First Unitarian Society of Chicago, Illinois Caucus for Adolescent Health, PACT- Positive Anit-Crime Thrust, Inc., and the Prison Action Committee.

6. Davis, "New Police Arrest Power Lights City Council Fuse," *Chicago Tribune*, June 18, 1992, pp. 1, 14.

read to require minority youth to leave any neighborhood where police think they do not belong; that it limits gatherings not just on street corners but in a wide range of public and privately owned locations; that it restricts groups as small as two or three people; and that it applies regardless of whether any of the individuals is engaged in loud, intimidating or obstructive behavior.

The ordinance drew both support and opposition from Chicago citizens of all backgrounds. The Chicago chapter of the NAACP denounced the proposal,[7] as did the editorial page of Chicago's leading African-American newspaper, the *Chicago Defender*.[8] The city's largest newspapers likewise condemned the proposal. The *Chicago Tribune* noted that the ordinance would "invite police abuses," and concluded, "if [residents] expect that this new ordinance will make their streets safe, they are bound to be disappointed."[9] The *Chicago Sun-Times* compared supporters of the ordinance to "the likes of George III and the tyrants of Beijing" and concluded that "[t]he proposed city ordinance to ban loitering by 'known gang members' is too vague, too unworkable and, above all, too unconstitutional."[10]

Opposition to the ordinance was especially intense in the African-American community. African-American aldermen opposed to the ordinance said it was "'drafted to protect the downtown area and the white community' at the expense of innocent blacks,"[11] and that under

7. Davis & Recktenwald, "Angry aldermen target gangs," *Chicago Tribune*, October 24, 1991, p. 1.

8. Editorial, "Supreme Court Should Squash Anti-Gang Ordinance," *Chicago Defender*, April 23, 1998, p. 11 (condemning the ordinance and noting the paper's earlier editorial stands against it). The *Chicago Defender* is a general circulation daily newspaper; it has no affiliation with the Cook County Public Defender, counsel to several respondents in this case.

9. Editorial, "Anti-Gang Law Isn't the Answer," *Chicago Tribune*, May 20, 1992, p. 16.

10. Editorial, "Put Permanent Hold on Anti-Loitering Law," *Chicago Sun-Times*, May 20, 1992, p. 37.

11. Spielman, "Loitering Ban Passes," *Chicago Sun-Times*, June 18, 1992, p. 16 (remarks of Ald. John Steele).

the ordinance "you're guilty until proven innocent."[12] One African-American alderman denounced the law as "anti-American and anti-African American" and argued that the ordinance would "restrict the movement of young blacks in a manner similar to the pass laws of South Africa."[13] In the final vote, the ordinance passed with support from most of the city's white aldermen but only six of the city's eighteen African-American aldermen.[14]

The City Council hearings established community concern about gangs but also cast doubt on the need for a new ordinance to respond to them. Numerous residents had described the ability of gang members to control street corners and intimidate residents. But Deputy Superintendent Cooper, the CPD representative at the hearings, testified:

> *there are already enough laws on the books at this point.* . . . [I]n the examples that people have been giving, . . . 90 percent of those instances are actually criminal offenses where people, in fact, can be arrested.

Supp. R. II 181-82 (emphasis added).

Cooper's testimony supporting the ordinance was so tepid that one alderman finally asked him, "Bottomline, what is the CPD's position on this ordinance? Do you folks want it or would you just prefer that it not be on the books?" Supp. R. II 185. Although the CPD, as part of the City administration, was officially committed to the proposal, Cooper replied:

> Under the appropriate circumstances, the ordinance can

12. *Id.* at. 1 (remarks of Ald. Dorothy Tillman).

13. *Id.* at 1, 16 (remarks of Ald. Dorothy Tillman). Reflecting the highly emotional character of the debate, one African-American alderman even objected, "What did Hitler do to the Jews? The same thing." *Id.* at 1 (remarks of Ald. Allan Streeter).

14. Official Journal, City of Chicago, p. 18293 (June 17, 1992). Eight African-American aldermen voted no, and four did not vote. The racial identity of the opponents is noted in Spielman, "Anti-Gang Law Won't Be Abused, City Says," *Chicago Sun-Times*, June 19, 1992.

be a viable tool for the police. What I am suggesting, however, is that there is much more that can be done *rather than an additional law on the books,* and I would prefer that the — or I would rather suggest or request the City Council, in its infinite wisdom, begin to look at the totality of the problem as opposed to looking at it from a one-dimensional point of view.

Supp. R. II 185-86 (emphasis added).[15]

2. In a series of court proceedings, thirteen trial judges passed on the ordinance. Ten trial judges held the ordinance unconstitutionally vague on its face, and one held it unconstitutional as applied; only two of the trial judges upheld the ordinance.[16] On appeal, the Illinois court of appeals unanimously held the ordinance unconstitutionally vague on its face, in violation of both the Illinois and federal constitutions.

The Illinois Supreme Court unanimously affirmed. The Court noted that the ordinance, as written, would apply to many innocent activities that the City Council could not have intended to restrict, *e.g.* waiting to hail a taxi. Pet. App. 10a. The Court accordingly assumed that the ordinance's definition of "loitering" was not intended to restrain all activity falling literally within its terms. Rather, the Court held that "[t]he definition of loitering . . . provides absolute discretion to police officers to decide what activities constitute loitering." Pet. App. 15a. The Court further found that because the City Council's intent was to "craft[] an exceptionally broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets," the ordinance was not susceptible to a limiting construction. Pet. App. 16a. The Court concluded that the ordinance was "impermissibly vague in all of its applications" (Pet. App. 7a) in violation of the due process requirements of both the Illinois (Pet. App. 6a) and federal constitutions.

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15. In light of Cooper's testimony, petitioner errs in asserting that "this record contains no evidence . . . that there were [other] means available to the City to address the problems engendered by gang loitering." Br. 27.

16. Poulos, "Chicago's Ban on Gang Loitering," 83 Cal. L. Rev. 379, 384 n. 26 (1995).

SUMMARY OF ARGUMENT

1. The Illinois Supreme Court ascertained the legislative purpose of City Council and determined that the ordinance was intentionally cast in "exceptionally broad" terms, Pet. App. 16a, so that police officers would have the power to disperse and, if necessary, arrest citizens whose behavior they consider objectionable. The Court then held that the ordinance, so construed, violates federal due process requirements. This Court has never overturned a state supreme court's judgment finding its own law impermissibly vague under these circumstances.

There is no reason to believe that the Illinois trial and appellate judges who ruled in this case are insensitive to the dangers of gang violence or unaware of practical problems that arise in prosecuting gang members under already-existing laws. Nor is there any reason to believe that these state judges felt constrained by federal precedent to invalidate an ordinance that they preferred to uphold. On the contrary, both Illinois appellate courts ruled unanimously that the ordinance violates the Illinois constitution as well.

Faced with a poorly drafted and largely incoherent legislative pronouncement, the Illinois Supreme Court made a reasonable effort to give it an intelligible meaning. The ordinance applies only to those who gather with "no apparent purpose." But if an intent to get fresh air or to observe the passing scene is a "purpose" within the meaning of the ordinance — if no interpretative gloss restricts the kinds of purposes that can qualify — then, as the Solicitor General concedes, "the ordinance would prohibit nothing at all." Br. U.S. 13. To avoid this result, petitioner suggests that an individual's "apparent purpose" must be "immediately discernible to a police officer." Br. 38. Yet, if given this gloss, the ordinance would constrain many varieties of constitutionally protected religious activity, political organizing, and other acts (*e.g.*, waiting for the chance to hail a taxi) that the City Council could not have intended to restrict.[17] And even with this gloss,

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17. Contrary to the claim of the Solicitor General (Br. U.S. 13 n.6), the Illinois Supreme Court was not ill-informed about the realities of hailing a cab in the city where it sits. On Chicago streets, many minutes can go by

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the ordinance would remain *un*available against its principal targets — known gang members who congregate to assert control over turf or to recruit new members — because these individuals have a readily discernible purpose. With or without petitioner's suggested gloss, the "no apparent purpose" language simultaneously prohibits much more and much less than the City Council could have intended. The Illinois Supreme Court accordingly concluded the "no apparent purpose" language simply served to cast a wide net, so that police officers would have discretion to decide on the spot which activities constitute the restricted kind of "loitering."

This was the correct interpretation of the ordinance and certainly not an unreasonable one. But even if this Court believes that the ordinance should have been given a narrower or more specific interpretation, that question is not one of federal law. Ascertaining legislative intent and making the prudential judgment whether to impose a narrowing construction on poorly drafted state legislation are quintessential matters of state law, on which the decision of a state supreme court is final.

The only federal question presented is whether the ordinance, *so construed,* is unconstitutional. Unless this Court is prepared to abandon the familiar *Papachristou-Kolender* standard,[18] there can be no doubt that a law is impermissibly vague when its terms leave police officers with substantive discretion to determine, without legislative or administrative guidance, which kinds of public behavior the law restricts.

2. Petitioner argues that vagueness problems are cured because

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without a taxi passing. See Hill & Downey, "Taxis Still Can Be Rare Despite Law," *Chicago Tribune*, May 24, 1998, p.1. Persons waiting to hail a cab do not constantly wave their arms in a way that would make their purpose apparent. Other *amici* make the same error, dismissing the Illinois Supreme Court's example as "nonsensical." Br. Nat'l Dist. Attorneys Ass'n 16. There is nothing nonsensical about waiting until a taxi is within sight before attempting to hail it.

18. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Kolender v. Lawson*, 461 U.S. 352 (1983).

an arrest under the ordinance must be preceded by a police order to disperse. But the unique terms of this ordinance's dispersal requirement *aggravate* vagueness problems. Contrary to petitioner's repeated assertions (Br. 11, 29, 30), it is simply not true that citizens can comply with the dispersal order merely by separating and moving on. The ordinance requires individuals to disperse *and* "remove themselves from the area." Pet. App. 61a. Even when individuals disperse and move on, they have no way to know how far they must go or how long they must remain away to avoid arrest. We have found no other law granting — and no judicial decision ever sustaining — any comparable police power to exercise spatial control over movement within a city.

3. At no time in the past twenty-six years has this Court or any state supreme court ever countenanced a law granting police the degree of untrammeled discretion that results from petitioner's concededly "novel" (Br. U.S. 28 n.19) ordinance. Implicitly recognizing the unprecedented nature of their claims, petitioner and several of its *amici* urge this Court to modify or abandon the *Papachristou-Kolender* standard. They argue that new conceptions of community policing and alleged improvements in the voting power of minorities render obsolete the traditional due process limits on police discretion to set substantive standards of behavior. Br. 15; Br. CNO 6, 9-14.

These radical arguments lack both legal and factual foundation. Due process cannot mean one thing when a minority group opposes loitering laws and a different thing when such a group allegedly favors them. *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) ("the standard of review . . . is not dependent on the race of those burdened or benefited"). In any event, most of Chicago's African-American aldermen did *not* support the ordinance.[19] And the

19. One group of petitioner's *amici* claims that Chicago's "minority communities" supported the ordinance and that it was enacted "at the behest of those very citizens." Br. Chicago Neighborhood Organizations [hereafter CNO] pp. 5, 14. Though the identity of supporters and opponents of legislation is not relevant to the validity of a constitutional challenge, these claims are in any event incorrect. The Northwest Neighborhood Federation (a diverse group based in a predominantly white section of the city) initiated the proposal, *see*
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leading proponents of community policing, including those cited and selectively quoted by petitioner itself, all stress the continuing importance of restraints on police discretion, including in particular the need to restrict police "sweeps" under broad anti-loitering laws. See Part IV, *infra*. Petitioner and its *amici* offer no justification for abandoning traditional due process principles, and make no showing that courts could manage the complex inquiries into minority-group preferences that would be necessary under the sliding-scale constitutional test that petitioner's *amici* propose, Br. CNO 13, as a replacement for the *Papachristou-Kolender* standard.

4. The undersigned *amici* fully share petitioner's objective of combating gang violence. But without disregarding settled due process limits, cities have a wide range of workable options, including traditional law enforcement (stops on founded suspicion and arrests on probable cause for criminal gang activity, intimidation, obstructing the public way, and other existing public-order offenses)[20] as well as the kind of cooperative neighborhood problem-solving efforts that constitute genuine community policing.[21]

Petitioner's claim that traditional due process limits must be

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Supp. R. II 30-32; it was "drawn up by several white aldermen and enthusiastically endorsed by Mayor Richard Daley." *Davis, supra* n. 6.

To demonstrate an alleged preference for the ordinance in the African-American community, petitioner's *amici* refer to a recent City Council resolution that passed with support from aldermen representing eight predominantly African-American wards. Br. CNO 15. But in the formal vote enacting the ordinance, the African-American aldermen split 8-6 against it, and the recent resolution of support was adopted under a suspension of City Council rules, apparently without notice or debate, with eleven African-American aldermen opposed, absent or not voting. City of Chicago, Official Journal, May 20, 1998, pp. 70134-35. The record is clear that support for the ordinance has been sharply divided and that this law has never commanded the support of a majority of the city's African-American aldermen.

20. *E.g.*, Ill. Stat. ch. 720 § 5/12-6.2 (intimidation for the purpose of furthering gang activities); § 570/405.2 (criminal street gang drug conspiracy).

21. See H. Goldstein, Problem-Oriented Policing (1990); G. Kelling & C. Coles, Fixing Broken Windows (1996).

suspended because neighborhood residents are too intimidated to testify in court about actual misbehavior, Br. 3, deserves little comment. In addition to standard police methods of surveillance and undercover observation, a citizen-witness's 911 call, stating that he has observed criminal behavior and describing the perpetrator, unquestionably is sufficient by itself to establish probable cause for arrest;[22] a fortiori, an officer can give a suspect the choice of moving on or facing arrest for the offense reported, without any need to consider whether the suspect was "loitering." And police can assure citizens of the complete confidentiality of such reports, even when the issue of probable cause must later be litigated. *McCray v. Illinois*, 386 U.S. 300 (1967). Nothing in the record or in the legislative findings of City Council offers support for petitioner's claim that police must have unchanneled discretionary authority to disperse and, if necessary, arrest individuals who have given no grounds for suspicion of any misbehavior whatever.[23]

The legitimate desire to combat gangs and to encourage effective policing strategy creates no need to suspend settled principles of due process, and it affords no justification for condemning the Illinois appellate judges who unanimously concluded that due process was violated by the unique terms of this Chicago ordinance.

22. Y. Kamisar, *et al.*, Modern Criminal Procedure 196 (7th ed., 1990).

23. The argument that innocent citizens must be dispersed to protect them from being caught in gang cross fire (Br. 37, Br. U.S. 29-30 n.20) likewise deserves little comment. Once police have ordered the suspected gang member to move on, the other individuals in the group are no safer (and might be less safe) if they disperse with him than if they simply remain where they are while he leaves. Neither petitioner nor the City Council has asserted that the risk of getting caught in gang cross fire creates any need to disperse groups *not* containing a suspected gang member.

ARGUMENT

I.

THE ORDINANCE'S DEFINITION OF LOITERING IS IMPERMISSIBLY VAGUE ON ITS FACE.

"The void-for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In addition, the vagueness doctrine requires that the offense be defined "in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* The Chicago ordinance is impermissibly vague on both grounds. In none of its conceivable applications does it provide fair notice to citizens or sufficient guidance to prevent arbitrary enforcement.

Petitioner insists that the term "loiter" has a readily understood meaning. Br. 30. Yet courts uniformly hold that when statutes prohibit loitering, without requiring proof of other elements, they are void for vagueness.[24] The reason is that the concept of "loitering" is either too subjective or too broad to identify prohibited conduct with reasonable definiteness.

The ordinary meaning of loitering is inherently subjective. "Loitering" is a pejorative term, signaling disapproval of the activity or the actor. When two senior citizens spend an evening chatting on a park bench, their neighbors would not speak of them as "loitering." But those neighbors would readily apply that label to teenagers from outside the neighborhood or other "undesirables" engaging in precisely the same conduct. A statute is void for vagueness if it proscribes conduct "annoying" to others (*Coates v. City of Cincinnati*, 402 U.S. 611 (1971)), even though the word "annoying" has a well understood meaning. For the same reason, the term loitering, as used in everyday conversation, is unacceptably vague for penal law purposes, even if observers of similar age and social background would agree about which activities deserve that label. The meaning of the word is determined by the personal sensibilities of the observer.

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24. *E.g., State v. Richard*, 836 P.2d 622 (Nev. 1992); *Farber v. Rochford*, 407 F. Supp. 529 (N.D. Ill. 1975).

Statutes that define loitering as standing or strolling "with no apparent purpose" seek to eliminate the overtly subjective element, but they then cover so many innocuous activities that they do not identify prohibited conduct at all. Courts uniformly and properly hold such statutes unconstitutional. As a recent FBI publication notes, "courts routinely have held that broadly worded vagrancy and loitering statutes that do not target other unlawful conduct are unconstitutional."[25] Without some additional element or narrowing construction, loitering — so defined — is inherently overbroad, not only in the sense that it can apply to constitutionally protected conduct, but also in the sense that, taken literally, it reaches activity that the legislature clearly had no desire to condemn. Such breadth of apparent coverage renders the statute *vague*, because the statutory terms afford no basis for distinguishing between conduct that remains permissible and conduct that the law is intended to proscribe.

Papachristou makes this point clear. This Court expressly held that "[t]he qualification 'without any lawful purpose or object' may be a trap for innocent acts." 405 U.S. at 164. Similarly, referring to another provision of the Jacksonville ordinance, this Court said that persons "'habitually . . . frequenting . . . places where alcoholic beverages are sold or served' would literally embrace many members of golf clubs and city clubs." *Id.* Unconstitutional vagueness resulted not from lack of meaning in the words themselves but from the implausible breadth of their coverage. This Court did not hold that a legislature *could not* make this conduct a crime;[26] it simply recognized that Jacksonville obviously *did not*. In such cases, the legislature has impermissibly "set a net large enough to catch all possible offenders." *United States v. Reese*, 92 U.S. 214, 221 (1875). In effect:

> Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense. In

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25. Regini, "Combating Gangs: The Need for Innovation," FBI Law Enforcement Bulletin, February 1998, p. 27.

26. Legislatures have unquestioned power to regulate bars and to prohibit the consummation of alcohol. E.g., *California v. LaRue*, 409 U.S. 109 (1972).

> short, these 'vagrancy statutes' and laws against 'gangs' are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided.

Winters v. New York, 333 U.S. 507, 540 (1948) (Frankfurter, J., dissenting).

The Chicago ordinance suffers from the same flaws; its definition of loitering offers no basis for distinguishing between conduct that the City Council intended to restrict and conduct that it intended to leave unfettered. Indeed, though petitioner and its *amici* insist that loitering has a perfectly clear meaning, they are unable to offer a single internally consistent explanation of what the ordinance covers. If, as petitioner insists, members of a religious group who gather at a street corner and wait for a chance to recruit new members cannot be dispersed, because they have an "apparent purpose" (Br. 20), then the ordinance is likewise inapplicable to gang members who gather at a street corner and wait for an opportunity to recruit new members. A group's purposes are just as likely to be apparent in one case as in the other. And neither the state nor the City has made it unlawful for gang members to noncoercively recruit new associates.[27]

As written, therefore, the ordinance affords no basis for distinguishing between the organizational activities of various groups. Either it requires officers to disperse Jehovah's Witnesses, Jews for Jesus, and Neighborhood CrimeWatch members who gather on street corners to recruit (when any participant is a suspected gang member), or it does not permit officers to disperse Gangster Disciples who gather on street corners to recruit. Neither interpretation makes much sense or accords even roughly with the City Council's evident intentions. Compare Pet. App. 60a-61a.

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27. Compare Ill. Stat. ch. 720 § 5/12-6.1, prohibiting the use of unlawful means to compel a person to join any organization. The behavior that most concerned the City Council — the "visibly lawless" behavior that petitioner repeatedly invokes (Br. 9-10, 12, 14, 16, 27, 44) — is left unrestricted by the ordinance as written, because the purpose of such behavior is apparent. When gang members obstruct the sidewalk or intimidate residents their conduct is addressed by other laws, but the loitering ordinance appears inapplicable and offers no additional tool for prosecuting such cases.

These anomalies could be avoided by assuming that the ordinance contemplates a selective determination of which "apparent purpose[s]" count. Yet neither the ordinance nor the implementing General Order offers any standard for making selective judgments about different "apparent purpose[s]." In fact, petitioner takes flatly contradictory positions on the question whether the "apparent purpose" inquiry can be selective. At one point petitioner suggests that persons "who are merely sitting on a park bench [or] chatting on a sidewalk" are subject to the ordinance (Br. 38); apparently, a readily apparent purpose to sit, chat, or engage in "mere casual social interaction" (Br. 10) does not count. At another point, however, petitioner appears to insist that any apparent purpose can qualify, a position that drives it to the astonishing conclusion that "[u]nder the ordinance, gang members remain free to . . . solicit contributions for their gangs" because this conduct "has an 'apparent purpose.'" Br. 27. Petitioner's view — that gang members are free to gather at street corners and politely ask each passing citizen to give five dollars to their gang — would surely surprise City Council supporters of the law. Indeed petitioner's interpretation, if sound, renders the ordinance virtually unenforceable — that interpretation apparently permits gang members congregating on a street corner to avoid arrest simply by wearing lapel buttons saying, "This is our turf," or "Give generously to the Gangster Disciples."[28]

Some of petitioner's examples suggest a different rule of interpretation: that productive purposes qualify, but that purposes to remain idle or to talk informally for reasons of rest or recreation do not.[29] That interpretation likewise creates untenable anomalies. It

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28. No doubt there are cases in which teenagers approached by the police say they were "doing nothing." They presumably mean they were doing nothing *wrong*; few would realize that this response puts them in jeopardy under the ordinance. If a teenager's "doing nothing" statement constitutes an admission of "loitering," the ordinance sets an especially effective trap for the unwary.

29. *See* Br. 10, stating that "mere casual social interaction" cannot count as a qualifying purpose. Partly contradicting this approach, petitioner declares that not all social purposes will be treated equally; a purpose to play basketball allegedly qualifies as an "apparent purpose" but a purpose to chat with a friend does not. Br. 38. One can readily imagine borderline cases — merely watching

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means that the ordinance would not reach conduct that the City Council surely hoped to cover (*e.g.*, gang efforts to control territory and recruit new members, see Supp.R.II at 32). At the same time, the ordinance *would* cover much conduct that the City Council presumably did *not* intend to reach. If casual purposes cannot count, then there is "loitering" when two sweethearts stand holding hands at a street corner after school, when three boys stand outside a movie theater discussing which show to see, when four teenagers stand across the street from their school waiting until the end of lunch hour, or when two senior citizens sit on a park bench chatting with their teenaged grandson. The ordinance, as written, would *require* a police officer to order these citizens to separate from one another and leave "the area" whenever one of them is reasonably believed to belong to a gang.

In observing that such activities are "innocent" (Pet. App. 9a), the Illinois Supreme Court never suggested that such activities are immune from regulation. Here, as in *Papachristou,* the problem is not that a legislature *could not* condemn such activities but simply that it *did not* — that the legislature could not have intended to restrict such activities and that the language enacted *"fails to distinguish* between innocent conduct and conduct calculated to cause harm." Pet. App. 9a (emphasis added).

As a result, the Chicago ordinance simply casts a wide net without identifying which activities the legislative body intended to reach. Such an ordinance "does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat." *Cox v. Louisiana*, 379 U.S. 536, 579 (1965) (opinion of Black, J.). By authorizing police action against whichever kinds of idle behavior police view with disapproval, the Chicago ordinance is for practical purposes identical to the ordinance condemned in *Coates*, providing an "obvious invitation to discriminatory enforcement against those whose association together is 'annoying.' " 402 U.S. at 616.

(Cont'd)
the basketball game might not qualify as a permissible purpose, or perhaps watching the game would qualify but merely talking about basketball would not. But the fundamental problem is more basic: even in core situations, the application of the ordinance is inevitably debatable.

The ordinance also threatens core First Amendment interests. If casual social interaction cannot count as an "apparent purpose," the ordinance then applies to the politician or would-be politician who chats casually with neighborhood residents, in periods between formal campaigns, with the unstated goal of building rapport with potential voters. Yet if the ordinance does not apply in this situation, it provides no standard for determining which casual social conversations constitute loitering and which do not.[30] And these difficulties of interpretation do not arise only at the margins. In every imaginable example, the ordinance requires police to make substantive policy judgments in order to avoid the odd results that would follow from applying its terms literally. The Illinois Supreme Court clearly was correct in holding that the ordinance sets no intelligible standard and in effect simply delegates "absolute discretion to police officers to decide what activities constitute loitering." Pet. App. 15a.

The Illinois Supreme Court also considered narrowing the reach of the ordinance, but determined that a limiting or clarifying interpretation would be inconsistent with the legislative purpose because:

> city council's intent . . . is clear and unambiguous. The city has declared gang members a public menace. . . . Accordingly, the city council crafted an exceptionally broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets.

Pet. App.16a.

The court therefore concluded that the ordinance's broad, unspecified conception of loitering was "not reasonably susceptible to a limiting construction." *Id.*

Faced with similar situations, this Court has frequently refused

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30. In the case of a known politician, police might decide that a casual social interaction with constituents qualifies as an "apparent purpose," but they would be much less likely to reach that conclusion in the case of someone they do not recognize as a political contender. Discrimination against political novices and outsiders is inherent in the "apparent purpose" inquiry.

to narrow a federal statute by making policy choices that Congress has ducked. *E.g.*, *United States v. Cardiff*, 344 U.S. 174 (1952). The Illinois Supreme Court chose the same path here, concluding that the legislative intent precluded judicial efforts to limit the ordinance's broad and uncertain reach.[31]

Lacking any such limiting construction, the ordinance is clearly void on its face, because in every situation it requires police to exercise unguided discretion to determine whether the conduct in question constitutes loitering. And, as the Illinois Supreme Court recognized, the General Order promulgated by the CPD does nothing to cure this problem, because the General Order makes no attempt to clarify what is meant by "loitering." *See* Pet.App. 64a-73a.

II.

THE INDETERMINACY OF THE TERM "LOITERING" IS NOT CURED BY THE REQUIREMENT THAT POLICE HAVE A REASONABLE BELIEF THAT ONE PERSON IN THE GROUP IS A GANG MEMBER.

In the context of Chicago's ordinance, the gang membership element does nothing to meet the *Papachristou-Kolender* requirement of adequate limits on law enforcement discretion. As we have discussed, the ordinance and the General Order provide police officers untrammeled discretion to determine which activities constitute loitering. And even when limited to groups that include a suspected gang member, the ordinance requires the exercise of unguided discretion to determine its scope. It provides no standard for determining when a probable gang member may stand with others watching a ball game in a park or wait with his sister for a chance to

31. The Solicitor General dismisses as "incorrect" the Illinois Supreme Court's understanding of the City Council's legislative purpose. Br. U.S. 26. This argument is simply not open for consideration in this Court. "[L]egislative intent is a matter of state law, on which the highest court of a state speaks with finality." *Della Grotta v. Rhode Island*, 781 F.2d 343, 347 (1st Cir. 1986). The same error is fatal to another *amicus*'s claim, in dismissing the Illinois court's view of the ordinance's purpose, that "[t]he evident purpose of the Chicago ordinance may be gleaned from its plain language." Br. Los Angeles County 14.

hail a taxi. It provides no standard for determining whether an aspiring politician may chat casually with a group in which the probable gang member is standing, or whether the gang member's own mother may sit with him on a park bench or stand outside with him on a hot night. Plainly, as the Illinois Supreme Court held, the ordinance contemplates the need for police discretion to determine on the spot which activities constitute the restricted kind of loitering.

It is true that this discretion can be deployed only in certain areas (*undisclosed* areas) of the city,[32] and only against some of the population — those who come in contact with suspected gang members. Petitioner in effect argues that discretion to determine allowable forms of public behavior is sufficiently limited if it can be deployed only in certain neighborhoods or only against certain classes of innocent people, people who are not themselves suspected of gang membership or any misbehavior. Yet this Court has never before suggested that it would uphold an ordinance that "does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat," *Cox*, 379 U.S. at 579 (opinion of Black, J.), on condition that this form of government be placed in effect only in designated but undisclosed sections of a city.[33] The Illinois Supreme Court should not be faulted

32. Letter dated July 8, 1998, from Counsel for Petitioner to Counsel for Respondents, indicating that areas designated for enforcement of the ordinance are not publicly available and will be disclosed, if at all, only in response to a party's discovery demand in litigation. The Solicitor General appears to be misinformed on this point. The Solicitor General asserts that citizens "may stand wherever they wish in areas of the city not designated by the general order." Br. U.S. 24. The designation procedure affords no such opportunity, because the location of the designated areas remains a closely guarded secret.

33. It is not amiss to mention the implications of this view for the minority youth of our nation. In cities where police lists of probable gang members have been analyzed, substantial portions of the city's African-American youth appear on such lists. In Los Angeles, 47% of the city's African-American youth, and in Denver 67% have been placed on police lists of probable gang members. Stolberg, "150,000 Are in Gangs, Report by D.A. Says Half of Young Blacks Are Members," *Los Angeles Times*, May 22, 1992, p. 1; Johnson, "2 out of 3 Young Black Men in Denver Listed by Police as (Cont'd)

for concluding that all segments of Chicago's law-abiding population have the same right to be governed by ascertainable law.

III.

THE VAGUENESS OF THE ORDINANCE IS NOT CURED BY THE REQUIREMENT THAT POLICE GIVE GROUP MEMBERS AN OPPORTUNITY TO DISPERSE.

Petitioner argues that vagueness problems are cured because an arrest under the ordinance must be preceded by an order to disperse. But a dispersal order does nothing to address the danger of arbitrary enforcement; indeed petitioner concedes as much: "if police officers are afforded standardless discretion to order individuals to move on, the mere fact that a police order is given does not serve to sustain the order." Br. 32.

Standardless discretion is precisely what the ordinance gives Chicago's police, as we have shown. But even if the preconditions for issuing a dispersal order were precise, the ordinance would still be vague, because the terms of the dispersal requirement are fatally ambiguous.

Petitioner asserts repeatedly that under the ordinance "people are told precisely what they must do to avoid arrest," and that "no one could fail to understand what is required of him," because the ordinance merely requires individuals to obey a police order to "disperse" or to "move on." Br. 11, 29, 30. This characterization of the ordinance is incorrect. Both the ordinance and the General Order require an arrest unless the members of the group promptly disperse *and* "remove themselves from the area." Pet. App. 61a, 72a.

(Cont'd)
Suspected Gangsters," *NY Times*, Dec. 11, 1993, p. A8. As a result, virtually any group of inner-city minority youth is likely to contain at least one person whom police consider a gang member. For these youth, the right to stand on the street will therefore exist "only at the whim of any police officer of the city," *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965) (or technically, any officer designated to enforce the ordinance), provided only that the group is considered to be "loitering."

Far from curing the vagueness of the other sections of the ordinance, the obligation to leave "the area" introduces additional vagueness. As the Illinois court of appeals noted, "[t]he ordinance and general order are also completely silent as to exactly how fast and how far the persons have to disperse in order to avoid arrest." Pet. App. 32a-33a. Yet petitioner's brief offers no defense of the ordinance's leave-the-area requirement.[34]

Kolender v. Lawson, *supra*, makes clear that a police order to leave "the area" is fatally vague. *Kolender* involved a California statute providing penalties for any person who "loiters or wanders . . . without apparent reason . . . and refuses to identify himself . . . when requested to do so . . . ." 461 U.S. at 353 n.1. In *Kolender* the California courts had narrowed the loitering provision by holding that an officer could request identification only when he had "reasonable suspicion of criminal activity sufficient to justify a *Terry* detention." *Id.*, 356. The state courts had also ruled that the identification provided by the suspect had to be "credible and reliable." This Court assumed that the *Terry* suspicion standard adequately guided the officer's discretion whether to request identification but nonetheless ruled the California law void on its face, because it "contains no standard for determining what a suspect has to do in order to satisfy the [identification] requirement." *Id.* 358.

The same vagueness problem arises in more acute form here. The Chicago ordinance applies to innocent citizens not suspected of illegal conduct or gang membership; as we have shown, it contains no standards for determining when a dispersal order can be issued; and it contains no standard for determining how far an individual must go or how long he must remain away in order to comply with the order. Nor is any such standard to be found elsewhere in Illinois law. To the contrary, Illinois precedent warns that "[s]tanding alone the word 'area' [in a statute] implies nothing as to size. It may be of large or small extent." *Illinois Cent. R. Co. v. Village of South Pekin*,

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34. That requirement is nowhere mentioned in petitioner's brief, except where the brief sets out the full text of the ordinance. Br. 4. The vagueness of the leave-the-area requirement was a ground of decision in the Illinois court of appeals, and respondents expressly argued the issue in the Illinois Supreme Court, Br. Resp. Ill. S. Ct. 46-47. As one group of petitioner's *amici* recognizes, the issue is properly before this Court. Br. Nat'l Dist. Attorneys Ass'n., *et al.* 24.

374 Ill. 431, 435, 29 N.E. 2d 590, 593 (1940). The leave-the-area requirement thus *adds* uncertainty for citizens seeking to comply with the law and provides a layer of added discretion for officers who are authorized to decide with no guidance whether an individual has left "the area." Even when a group has dispersed and begun to move away, each individual remains subject to arrest if he fails to move far enough, or returns to "the area" too soon.

The puzzling arrest statistics reported by the CPD seem less surprising in this light. From 1992 until 1995, police issued 85,197 orders to disperse, and in 49% of these cases, police decided that individuals were disobeying their orders; 41,740 individuals were arrested.[35] If the order to disperse is as clear and easy to satisfy as petitioner claims, such a high rate of noncompliance is inexplicable. It is not likely that so many young gang members were defiantly defending their "turf" against armed officers, or that they welcomed the chance to spend time in Cook County Jail. Common sense suggests that many of these young persons wanted to avoid arrest but failed in their efforts to comply. The obligation to leave an unspecified "area" is so ambiguous that it "creates a trap for the wary as well as the unwary." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991) (opinion of Kennedy, J.).

Chicago's leave-the-area requirement appears to be unique. The great majority of relevant state laws authorize only a police order to disperse or move on.[36] A few state laws authorize orders with some spatial component, such as orders to "depart" or "leave." But in all the examples we have found, such orders to leave can be issued only under narrowly defined circumstances such as riot or accident.[37] Such

35. Gillis & Spielman, "City's Loitering Law Ruled Unconstitutional," *Chicago Sun-Times*, Dec. 19, 1995, p. 3.

36. Among the forty-one "State Dispersal Laws" cited by *amici* Ohio, *et al.* (Br. Ohio A-4 to A-8), thirty-three authorize only an order to "disperse," "move" or "move on"; the only cited laws with a spatial component ("depart," "leave" or "withdraw") are those of Georgia, Illinois, Massachusetts, Michigan, Minnesota, New Hampshire and Wisconsin, while Ohio's statute requires obedience to any "lawful order." See *id.*, and statutes there cited.

37. The Ohio statute, for example, applies only in cases of "fire, accident, (Cont'd)

orders automatically acquire content by reference to the emergency itself; a law-abiding person can readily understand the expectation that he move out of sight and earshot.

Here, in contrast, there is no indication that moving out of sight of a particular street corner would constitute leaving "the area." If the "area" concept has any content, in the present context, it *might* mean leaving "the neighborhood," a locale that is not only vague but also, in Chicago, closely tied to race and ethnicity.[38] A law authorizing police to order strangers back to their own neighborhood would make all-too-real the concerns of Chicago aldermen who compared this ordinance to South Africa's pass laws.[39] In the Chicago setting, such a law could not easily survive equal protection scrutiny, and petitioner does not suggest that the "area" concept should be so understood. Yet if an "area" cannot be equated with a neighborhood, it remains totally unclear what its limits are or what criteria might be used determine them.

No decision of this Court, or of any state court we have discovered, has ever permitted any comparable police power to exercise spatial control over movement within a city. *Cox v. Louisiana*, 379 U.S. 559 (1965), where this Court reversed a conviction for demonstrating "near" a courthouse, offers an instructive contrast. The Court assumed that the term near "may not [be] unconstitutionally vague, at least as applied to a demonstration within the sight and hearing of those in the courthouse." In reaching that conclusion, the Court stressed that the statute permitted "a degree of on-the-spot administrative interpretation" and held that "[t]his administrative discretion to construe the term 'near' concerns a limited control of the streets and other areas in the immediate vicinity of the courthouse

(Cont'd)
disaster, riot or emergency." *Id.* A-7. Each of the other state statutes authorizing an order to depart or leave is similarly limited. See *id.* A-5 to A-8 and statutes there cited.

38. *See* D. Massey & N. Denton, American Apartheid 76 (1993) (noting that by most measures Chicago is the most or second-most highly segregated city in America).

39. *See supra* note 13 and accompanying text.

and is the type of narrow discretion which this Court has recognized as . . . proper." *Id.* 568-69.[40] No comparable measuring rod is implicit in the Chicago ordinance. It applies at numerous undisclosed locations, is not limited to the immediate vicinity of any point, and does not contemplate any on-the-spot guidance to indicate what the citizen must do to comply.

Such an ordinance is void on its face because it is vague in all its applications. It is true that a citizen who stands his ground cannot plausibly claim to have left the area. But *Kolender* presented the same question. As Justice White argued there in dissent (461 U.S. at 472), the *Kolender* statute was clear as applied to the defiant citizen who refused to provide any identification. This Court considered Justice White's example irrelevant to a facial challenge. As *Kolender* holds, due process requires that laws, however ambiguous at their edges, offer some safe harbor for the law-abiding citizen who seeks to comply. In the *Kolender* setting there were no objective standards the officer could apply, once identification was offered, to determine whether it was "credible."

The Chicago ordinance poses the same problem, in more acute form. Short of fleeing the jurisdiction, the person who tries to comply has no way to know how far he must go or how long he must remain away in order to avoid arrest.[41] Independent of every other vagueness problem, the leave-the-area requirement violates *Kolender*'s principle

40. All of this Court's decisions emphasize comparable limitations. *Grayned v. City of Rockford*, 408 U.S. 104 (1972), held that a law prohibiting noise in any area "adjacent" to a school was not vague because "there must be demonstrated interference with school activities." *Id.* at 114. *Colten v. Kentucky*, 407 U.S. 104 (1972), held that a police order was not vague where it required Colton to leave a place where police were investigating a traffic violation and where conviction required "the intent of causing inconvenience, annoyance, or alarm." *Id.* at 110. *Boos v. Barry*, 485 U.S. 312 (1988), upheld a law prohibiting demonstrations within 500 feet of an embassy. In all such cases the spatial scope of the legal requirement is readily ascertainable.

41. One option would be for him to go home, but if his home is his only safe harbor, then the ordinance in effect permits the police to impose house arrest without trial, for an indeterminate period, on any citizen found in public with a person reasonably believed to be a gang member. Petitioner has not attempted to defend the ordinance on this basis.

that a police officer's order must have ascertainable content and afford the citizen a reasonable opportunity to comply.

IV.

THE *PAPACHRISTOU-KOLENDER* STANDARD SHOULD NOT BE DILUTED OR DISCARDED.

To date, judicial and scholarly opinion has been virtually unanimous in concluding that the Chicago ordinance is unconstitutional under existing precedent.[42] Accordingly, one group of petitioner's *amici* seek to win reversal by convincing this Court to "reserve" the *Papachristou-Kolender* standard for cases in which a court finds a law's impact to be "concentrated on a politically disempowered minority." Br. CNO 6. In other cases, they argue, this Court should replace existing principles with a sliding scale of review that would "depend on how widely the burden of that law is likely to be felt" (*id.* 9), taking into account such factors as "the relationship between the supporters of the law and those to whom it is being applied." *Id.* 13.

This approach is unsound both in theory and practice. The due process right to be governed by comprehensible law is a privilege of all citizens, regardless of race;[43] standards of constitutional review are "not dependent on the race of those burdened or benefited." *City of Richmond v. J.A. Croson Co.*, 488 U.S. at 494. And these *amici* do not indicate how courts could manage the elaborate factual and political inquiries that their sliding-scale approach would require.[44]

42. Berg, "The Troubled Constitutionality of Antigang Loitering Laws," 69 Chi. Kent L. Rev. 461, 485 (1993); Poulos, *supra* n.16, at 409; Livingston, "Police Discretion and the Quality of Life in Public Places," 97 Colum. L. Rev. 551, 622 (1997).

43. *Connally v. General Constr. Co.*, 269 U.S. 385 (1926); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

44. These *amici* also fail to explain why their own test would not require especially strict scrutiny in the present case, given the level of opposition to the ordinance among Chicago's African-American aldermen. See *supra* notes 13-15 and accompanying text.

Petitioner is less specific in describing the new constitutional test it seeks, but it nonetheless urges this Court to relax the *Papachristou-Kolender* standard on the ground that "commentators have repeatedly called for courts to provide greater leeway for state and local governments to address signs of chronic disorder on the streets." Br. 15.

Petitioner misapprehends the thrust of this academic literature; the critique of state caselaw that these commentators voice is important but narrow. These commentators condemn broad laws against loitering and reserve their criticism for judicial decisions that sometimes misapply *Papachristou-Kolender* by requiring overly strict proof of criminal intent or other elements that modern laws use to ensure clarity in laws against loitering.[45] Far from questioning the *Papachristou-Kolender* standard, the leading proponents of community policing all emphasize the importance of continuing to limit police discretion to set substantive standards of acceptable public behavior.

Professors Kelling and Coles make this point emphatically. They note that their "broken windows" thesis was often *misinterpreted* as an invitation to sweep unwanted persons from the streets:

> In fact, the ideas presented in 'Broken Windows' were antithetical to the use of 'streetsweeping' tactics targeted on 'undesirables'; rather, they advocated close collaboration between police and citizens, including street people, in the development of neighborhood standards. . . . [Yet] the distinction between order maintenance and 'streetsweeping' was not always apparent to police . . . . One attempt at implementing an order-maintenance approach conducted in Chicago in 1982 used police officers brought in on overtime assignments to sweep through troubled areas and arrest youths congregating on streets. *While these sweeps may have been directed against disorder, they did not constitute order maintenance of the ilk Wilson and Kelling had in mind in 'Broken Windows'* . . . . Clearly, all police actions involved in order maintenance would have to be grounded in law and subject

45. See Livingston, *supra* n.42, at 612-13, 621-26.

> to clear constitutional constraints against infringement of individual liberties.[46]

The other proponents of community policing cited by petitioner stress similar concerns. Wesley Skogen specifically criticizes a Newark police operation in which:

> groups of four or more persons 'congregating to create a public hazard' (in the words of the state statute) were first warned by officers . . . that they were required to disperse. A few minutes later, vans and squad cars descended on the area to search and arrest those who failed to heed the warning.[47]

Though Newark's law was notably narrower than Chicago's (requiring proof of a purpose "to create a public hazard"), Skogan nonetheless concludes that Newark's sweeps were "of doubtful legality"[48] and stresses that "[n]o lawyer committed to traditional constitutional conceptions . . . would regard the [Newark] sweeps as anything but unlawful."[49]

This continuing consensus against broad anti-loitering laws reflects, among other concerns, an awareness that tension in relationships between police and segments of minority communities

46. Kelling & Coles, *supra* n.21, at 22-23.

47. W. Skogan, Disorder and Decline 111 (1990).

48. *Id.*

49. P. 165, quoting J. Skolnick & D. Bayley, The New Blue Line 199 (1986). Livingston likewise condemns loitering laws that "devolve[ ] law-making authority on the police" (Livingston, *supra* n.42, at 628), and argues only that courts should uphold laws that regulate "loitering without legitimate purpose about certain narrowly specified and especially vulnerable places of generally restricted access (like schools . . .)" *Id.* at 639. She insists that loitering laws must not be "aimed at excluding outsiders from full participation in the community" (*id.* at 647), and must provide for continuous monitoring of the law's impact on disfavored groups. *Id.* at 653-67. Even under her approach, Chicago's ordinance must fall, as Livingston herself appears to acknowledge. *Id.* at 622, 667-68.

remains acute. James Q. Wilson, who with Kelling originated the "broken windows" thesis, cautions:

> We are at mid-stream in our efforts to produce a society in which whites and blacks can live together decently well. Such a transformation is still decades away, and in this time there will be more riots, more suspicion, and more political manipulation. The vast gains that African Americans have made . . . coexist with a deep layer of anger, distrust, and confusion.[50]

Similarly, police experts Hubert Williams and Patrick Murphy note:

> [A]lthough the police are better prepared to deal with the residents of the inner city than they were twenty years ago, they are far from having totally bridged the chasm that had separated them from minorities — especially blacks — for over 200 years. There are still too few black officers, at all levels. Racism still persists.[51]

Progress in race relations, though undeniable, is simply not relevant to the allowable vagueness of statutory language, nor in any case is it sufficient to support the radical change in constitutional doctrine that petitioner and its *amici* seek.

* * * *

Like all Chicago residents, the undersigned *amici* and their members live with crime on a daily basis and want effective protection from gang intimidation and violence. But all citizens have the right

50. James Q. Wilson, "The Closing of the American City," *The New Republic*, May 11, 1998, pp. 30, 38.

51. Hubert Williams & Patrick V. Murphy, The Evolving Strategy of Police: A Minority View, in Perspectives on Policing, No. 13 (U.S. Dept. of Justice, Nat'l Institute of Justice, Jan. 1990). Similarly, former New York City Police Commissioner William Bratton warns: "As police leadership has accepted responsibility for reducing crime and fear, so too must it accept responsibility for dealing with racism, brutality, and inappropriate attitudes in the ranks. The first step is to admit there is a problem." William Bratton, Turnaround 312 (1998).

to be governed by understandable laws that include reasonable standards to prevent arbitrary enforcement. Petitioner has made no showing that its laudible goals cannot be achieved by a number of straightforward expedients — including enforcing existing laws, as Deputy Superintendent Cooper urged from the outset, or, if need be, authorizing police officers to order individuals to move on, regardless of whether they are "loitering," whenever there is probable cause to believe that they are obstructing sidewalks, intimidating others, or conspiring to advance criminal activities. Petitioner has offered no convincing reason why its police must be permitted broad discretion to control the "casual social interaction" (Br. 10) of law-abiding citizens, including those not remotely suspected of gang involvement. Petitioner has established no need to suspend the settled due process principles which clearly render its vague regulation of "loitering" unconstitutional.

CONCLUSION

The judgment of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

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